

KAUA'I PLANNING COMMISSION
REGULAR MEETING
October 27, 2015

The regular meeting of the Planning Commission of the County of Kaua'i was called to order by Chair Anderson at 9:19 a.m., at the Līhu'e Civic Center, Mo'ikeha Building, in meeting room 2A-2B. The following Commissioners were present:

Chair Angela Anderson
Vice Chair Sean Mahoney
Mr. Louis Abrams
Mr. Wayne Katayama
Mr. Roy Ho

Absent and Excused:
Mr. Kimo Keawe
Ms. Amy Mendonca

The following staff members were present: Planning Department – Michael Dahilig, Leslie Takasaki, Kaaina Hull, Marisa Valenciano, Jody Galinato; Deputy County Attorney Jodi Higuchi-Sayegusa, Office of Boards and Commissions – Administrator Jay Furfaro, Commission Support Clerk Darcie Agaran

Discussion of the meeting, in effect, ensued:

CALL TO ORDER

Chair Anderson called the meeting to order at 9:19 a.m.

ROLL CALL

Planning Director Michael Dahilig: Vice Chair Mahoney?

Mr. Mahoney: Here.

Mr. Dahilig: Commissioner Katayama?

Mr. Katayama: Here.

Mr. Dahilig: Commissioner Abrams?

Mr. Abrams: Here.

Mr. Dahilig: Commissioner Mendonca? Commissioner Keawe? Commissioner Ho?

Mr. Ho: Here.

Mr. Dahilig: Chair Anderson?

Chair Anderson: Here.

Mr. Dahilig: Madam Chair, you have five (5) members present.

APPROVAL OF THE AGENDA

Mr. Dahilig: Madam Chair, you are now on the Approval of the Agenda. The Department would suggest, after the approval of the agenda, a moment to provide an announcement. And then just from a timing standpoint, to move Item K, which is Committee Reports, before the General Business Matters. And then as a heads-up that the 9:00 agenda will be recessed to take up the 9:01 agenda at 10 o'clock this morning. From a procedural standpoint, that would be the recommendations of the Department this morning.

Chair Anderson: Do I have a motion to approve the agenda as amended?

Mr. Abrams: So moved.

Mr. Mahoney: Second.

Chair Anderson: All those in favor? (Unanimous voice vote) Any opposed? (None) Motion carries 5:0.

Mr. Dahilig: Thank you, Madam Chair. As for the announcement, I'll hold up this newspaper. I'm going to call Lee Steinmetz up to the mic. Yesterday was definitely a historic day for Kaua'i. We don't usually like to be self-promoting, but in this case, who cares? (Laughter in background) Lee led a team of cross-departmental staff to apply for a TIGER (Transportation Investment Generating Economic Recovery) grant from the Federal Department of Transportation. The TIGER grant is, essentially, a competitive transportation innovation grant that promotes types of development within communities that the Department of Transportation sees as sustainable, multi-modal, and so forth. The County applied for this, and we are the only County in Hawai'i to receive, from the pot of \$500 million, \$13 million towards revitalization of Līhu'e. I wanted to bring up Lee and thank him for his work on this. And also have him explain to the Commission what you'll be seeing over the next couple of years, and how this grant is really transformational with respect to creating great walkable, bike-able, and sustainable places on the island. So Lee, you can take it away.

Lee Steinmetz: Thank you, Mike, and good morning to the Commissioners and Madam Chair. Yesterday was a really exciting day when we got this news. I want to thank Mike and really everybody who...it was a large team that worked on this. It was incredible teamwork. Our team stretched from Kaua'i to Washington D.C., and all points in between. It was just really exciting. I also want to say that the success of this grant really started with a vision for our community that

is in our planning documents in the Līhu‘e Town Core Urban Design Plan, for example, which really set the tone, and the Mayor’s Holo Holo 2020 vision. This grant really just carries out a vision that has already been established by the community. It will include improvements on Rice Street to make it more pedestrian and bicycle friendly, and also friendlier for commercial development and revitalization. You’ve seen part of Eiwa Street get constructed as a transit hub, and this grant allows us to complete that construction. We could only do the first part of it, as a part of Hardy Street, so now we are able to finish that. We’ll be doing sidewalk improvements in the area around the new Rice Camp Senior Housing, so that both people from the affordable housing, Līhu‘e Court Townhomes, and the Senior Housing can now have better pedestrian access into our downtown area and access to schools, access to jobs, access to services. Then we will be doing a shared-use path between the Civic Center and Convention Hall, which will now allow us to use our parking resources better to manage our parking resources that we have at both of these locations; as well as a shared-use path going to Vidinha Stadium, so now we are connecting our major recreational center with our commercial center. So those are some of the improvements that you’ll be seeing. There are actually seven (7) project components that were funded through this grant. By the way, there’s a TIGER website that’s linked to the Mayor’s page on the County website. All of our grant application material is available there if anybody wants to look at it in more detail. Thank you.

Chair Anderson: Thank you.

Mr. Dahilig: So Commissioners, just, again, wanted to share the news with everybody because the Commission did have a large part, and also with the visioning process and the development of a lot of the core planning documents. This gives us the ability, as Lee said, to actually implement these visions. This is a huge boost. Especially when you look at a bond outlay for the County, which is only about 60 million every time we issue a bond, so this is quite a substantial chunk of money that the Federal Government has granted us. Again, Lee you can correct me if I’m wrong, but I think for every dollar that was awarded, there was \$20 that was applied for. So this was a highly competitive grant where only 5% of the dollars was actually awarded for what was asked for, so it shows that we can be competitive and we can win these things. So I just want, again, to publicly share the news, but also publicly thank Lee with the Commission here for his efforts on this work, and thank everybody else that was involved. Thank you, Chair.

Mr. Steinmetz: Thank you. (Applause)

MINUTES of the meeting(s) of the Planning Commission

Meeting of September 8, 2015

Meeting of September 22, 2015

Mr. Dahilig: Madam Chair, we are on Item D, which is Minutes of the Meetings of the Planning Commission for September 8th, and September 22, 2015.

Chair Anderson: Okay. Do I have a motion from the Commission regarding approval of the minutes for September 8, 2015?

Mr. Mahoney: Move to approve.

Mr. Abrams: Second.

Chair Anderson: Any discussion? (None) All those in favor? (Unanimous voice vote) Any opposed? (None) Okay, motion carries 5:0.

As to a motion for the meeting of September 22, 2015. Is there a motion?

Mr. Mahoney: Move to approve, Madam Chair.

Mr. Abrams: Second.

Chair Anderson: Any discussion? (None) All those in favor? (Unanimous voice vote) Any opposed? (None) Motion carries 5:0.

RECEIPT OF ITEMS FOR THE RECORD

Mr. Dahilig: Thank you, Madam Chair. We do have items to receive for the record this morning. There was testimony from Catherine Cown concerning the Homestay measure; as well as written testimony from Sam Lee, Tina Sakamoto, Barbara Robeson, Julie Souza, and Caren Diamond as to the Homestay measure. Those are the only additional items that we have for this agenda, Madam Chair. Actually, one (1) more item, a letter from Douglas Henry in opposition to Class IV Zoning Permit at 3957 Ulu Alii Street. And then we also have the update to the 6th Annual Status Report that has been circulated regarding the Somers matter. These items are for receipt by the Commission, Madam Chair.

Chair Anderson: Do I have a motion to receive?

Mr. Mahoney: Move to receive, Madam Chair.

Mr. Abrams: Second.

Chair Anderson: Any discussion? (None) All those in favor? (Unanimous voice vote) Any opposed? (None) Motion carries 5:0.

HEARINGS AND PUBLIC COMMENT

Continued Agency Hearing (NONE)

Mr. Dahilig: Thank you, Madam Chair. We are now on Item F.1., which is Hearings and Public Comment. We have no Continued Agency Hearings this morning.

New Agency Hearing

Class IV Zoning Permit Z-IV-2016-3 and Use Permit U-2016-3 to facilitate conversion of a portable into an administration building and to accommodate future school improvements that includes classrooms and a gymnasium on the St. Catherine's Church/School campus, situated at the Kawaihau Road/Hauaala Road intersection and further identified as Tax Map Key (4) 4-6-015:058, 060, 064 and 067, and containing a total area of approx. 11.76 acres = Roman Catholic Church.

Mr. Dahilig: Now on Item F.2., New Agency Hearing. This is F.2.a., Class IV Zoning Permit Z-IV-2016-3 and Use Permit U-2016-3 to facilitate conversion of a portable into an administration building and to accommodate future classroom improvements that includes classrooms and a gymnasium on the St. Catherine's Church/School campus, situated at Kawaihau Road/Hauaala Road intersection and further identified as Tax Map Key (4) 4-6-015 parcels 58, 60, 64, and 67, and containing a total area of 11.76 acres. The applicant is the Roman Catholic Church, Madam Chair. The report was received by the Clerk of the Commission on 10/13/15.

The Department would recommend opening the agency hearing on this matter at this time.

Chair Anderson: Is there anyone in the public that would like to give testimony on this agenda item?

Mr. Dahilig: Madam Chair, I do not have anybody signed up to testify on this particular agenda item. The Department would recommend closing the agency hearing at this time.

Chair Anderson: Seeing that there is no one in the public here to testify on this agenda item, is there a motion to close the agency hearing?

Mr. Abrams: So moved.

Mr. Mahoney: Second.

Chair Anderson: Any discussion? (None) All those in favor? (Unanimous voice vote) Any opposed? (None) Motion carries 5:0.

Continued Public Hearing

Zoning Amendment ZA-2015-7: A bill for an ordinance amending Chapter 8, Kaua'i County Code 1987, as amended, to establish a process to permit Homestays in the Commercial Districts, Resort Zoning Districts and Residential Zoning Districts = County of Kaua'i, Planning Department.

Mr. Dahilig: Thank you, Madam Chair. We are now on Item F.3.a., Continued Public Hearing. This is Zoning Amendment ZA-2015-7. A bill for an ordinance amending Chapter 8, Kaua'i County Code 1987, as amended, to establish a process to permit Homestays in the Commercial Districts, Resort Zoning Districts, and Residential Zoning Districts. This is a bill the Department is proposing and it was continued from 09/08/15. There is a Supplemental No. 1 Director's Report for this matter.

Madam Chair, I do have three (3) individuals signed up to testify on this item, and would recommend reopening the public hearing.

Chair Anderson: Okay.

Mr. Dahilig: Sam Lee, followed by Barbara Robeson, followed by Tina Sakamoto. Sam Lee.

Sam Lee: Good morning, Madam Chair and members of the Commission. My name is Sam Lee, one (1) of three (3) speakers in favor of the adoption of the revised form of the Homestay Ordinance.

A brief history about the progress of this ordinance since the interim ordinance was adopted. The effort to adopt a permanent ordinance started with a 9-page document. Okay. After diligent work by the Planning Department, and I'd like to single out Deputy Director Hull for his efforts and the time he has put in to crafting this document; the nine (9) pages were reduced to four (4) pages. We then, the Citizens Committee then spent an afternoon meeting with Mr. Hull, went over the revisions that the Planning Department suggested, went back to the drawing board, and came up with a third iteration of the ordinance, which then took the document back to six (6) pages. Okay, and you have that document before you today. Basically what we've done is, in an effort to make for a stronger and, perhaps, a tighter ordinance, we've added things back that were...some of the items that were taken out of the original 9-page document. So most of the additions that you will see in red here are what were originally contained in the 9-page document, okay.

We are going to speak in sequence here. I will take the first two (2) pages of our document, and then we'll go down the line to Barbara, and so forth.

Okay, so on Page 1, if you'll note, our insertions or additions are outlined in red for the Commission's attention. What we've done here on the bottom of Page 1 is under "Definitions", we are suggesting that some definitions be added. One (1) is "Census Designated Place", the second is "Homestay"; define "Homestay", what a homestay is. And thirdly, on the top of Page 2, we are suggesting that "Homestay Quota System" be reinserted as part of the regulation. With the remaining time that I have, I can flesh out some of the reasons why we are suggesting these additions. We feel that putting the CDP back into the regulation...

Mr. Dahilig: Three (3) minutes, Madam Chair.

Mr. Lee: Defines population centers across Kaua'i. We feel this is essential to being able to establish a rational homestay quota number for each tied to a CDP. As far as the definition of Homestay...

Chair Anderson: Excuse me, Mr. Lee. We do have a limitation of three (3) minutes, so you can summarize or we can continue on with the next person.

Mr. Lee: Okay, I'm done. I think what we had to say is here.

Chair Anderson: Okay, thank you so much. I'm sorry to interrupt.

Barbara Robeson: Barbara Robeson for the record, and I'm beginning on Page 3. Just to focus in on the underlined, red documentation on Page 3, we added this maximum of two (2) persons per bedroom, and that's related to the proposed definition that we have on Page 1 of the carrying capacity as it relates to health, safety, and welfare of those outside of the VDA. Item No. C, the red, is the carrying capacity of residential neighborhoods must be evaluated and considered prior to the approval of added transient use. That's, again, related to our proposed definitions that we took from your previous Exhibit B, and it relates to the CDP and the Homestay Quota System. Then going to Page 4, we are proposing that wording for "sleeping quarters" be changed to "bedroom" because it's much more clear, from our perspective anyway, about what a bedroom is and it meets the building codes; that it's not a living room, a garage, or a kitchen or something like that, that could be folded into sleeping quarters, so we'd like to see that "sleeping quarters", that wording gets changed to "bedroom." But from my perspective, and you've heard this from me before, on this tsunami evacuation issue, so if we go back up to E on Page 4, we are very supportive of this proposed addition that's coming from the Planning Department. At the bottom of E, it says for those homestays located in the tsunami evacuation zone, prior to registration, renters must be informed that the homestay is located in the tsunami evacuation zone and of all corresponding evacuation procedures. We are extremely supportive of this Planning Department language. As mentioned in previous testimony from me before you and also the County Council, I had a lot of concerns, particularly about the tsunami evacuation zone on the north shore from Hanalei to the end of the road in Hā'ena. To give you an example, Hanalei to Hā'ena is in the tsunami evacuation zone, and there is one (1) way out to get out of the evacuation zone. You've got to go up the road, or down the road, towards the Princeville area, and cross the Hanalei Bridge and go up the hill. So it could be very intensive and the concerns that we have in general about the...

Mr. Dahilig: Three (3) minutes, Madam Chair.

Ms. Robeson: Yes, okay. Anyway, well I'll just pass it on to Tina, then.

Tina Sakamoto: Good morning. Tina Sakamoto. I'll continue now on to Page 4, Section 8-18.3, Renewal of Homestay Zoning Permits. Under A, in addition to the TAT and the GET tax license, we propose to insert, "and shall provide a current and complete State of Hawai'i Income Tax Return and a State of Hawai'i Tax Clearance Certificate". The reason why we would like this insertion is to ensure that the reporting and payment of revenue and taxes is complied with. Continuing in the same section under D, we propose that the annual renewal fee would be equal

to \$1,100 instead of the \$750. This would be the same amount as the initial fee, which is the applicant's business cost and should not be subsidized by the County taxpayers. Continuing again, the same section, a new item E, we provided a revocation date should the homestay operator fail to comply with the homestay requirements. The section would read, "Failure to annually renew the homestay operation invalidates its legal operation." Continuing on Page 5, we've reinserted two (2) sections taken from Exhibit B. The first one is Section 8-18.4 for complaints against the homestay operation. We would like to establish a mechanism should the homestay cause an incompatibility issue with the neighborhood. So the one (1) change would be from three hundred (300) to five hundred (500) feet for the complaints of property owners within the nearest point of the premises of the homestay. The neighborhood would generally...it's a geographical, localized community, and some of the definitions presented was how far an average walk would be within five (5) minutes, so that's about half a mile. So this is generous in the five hundred (500) rather than going to the twenty-six hundred (2,600) plus radius. This would then give an avenue for a complete neighborhood to express their concerns. The last one I believe would be also notification for the homestay procedures would increase the percentage from 85% to 100% and still maintain that 500-foot distance from the nearest point of the premises. The reason why we're going from 85% to 100% is because previous testimony before the Commission revealed that homestay applicants had canvassed affected neighborhoods, so they could pick and choose who they wanted to notify of the 85%. We would refer to this as "stacking" in order to gain an unfair advantage, so we are proposing that would be 100% to all affected properties, rather than the 85%. I think that would conclude our proposed amendments.

Mr. Dahilig: Three (3) minutes, Madam Chair.

Ms. Sakamoto: And I do hope, on behalf of the group, that you do consider these amendments and institute them in this new Exhibit A. Thank you.

Chair Anderson: Thank you.

Mr. Dahilig: Madam Chair that is all I have signed up to testify on this particular agenda item. I would suggest making a call for any final testifiers.

Chair Anderson: Is there anyone else in the public that would like to give testimony at this time?

Jonathan Chun: Yes. Jonathan Chun on my behalf; not on behalf of any particular client. I have no client in this matter. But I was just listening to the testimony, and I want to bring this to the attention of the Commission because I brought this to the attention of the County Council back in 2008 when the issue came up about tax returns. I just want to make sure that people are aware of the concerns. Tax returns by State and Federal law are considered confidential information. By State and Federal law, tax returns can only be provided to government agencies if there is an agreement between that government agency and the taxing authority. There is none between the Planning Department and any taxing agency of the State of Hawai'i or the Internal Revenue Service. The reason for those regulations is that the State and Federal Government are very concerned about tax information getting into the hands of the public because they are confidential. The State and the Federal Government says that if there is an agreement, they have to have rules by the receiving agency of how they are going to prevent disclosure of confidential

tax information to members of the public. I point that out because that's in black and white, it's in statutes, it's in the rules, and it's never been addressed by the County on that issue. The third issue related to that is the State of Hawai'i, I believe, considers, and the State Constitution considers financial information private. It impacts the State of Hawai'i Right of Privacy. If that is true, then the County ordinance that is being proposed would require somebody to give up a Constitutional right in exchange for getting a permit, and that has been held by the United States Supreme Court as being unconstitutional.

Now, I haven't seen the ordinance, and I just wanted to say and make it clear, I'm not representing any client. I haven't seen the ordinance, I'm just listening to the testimony today, but I'll urge the County to ask its Deputy County Attorneys to look into that issue of whether or not requiring, as a condition of a permit, disclosure of confidential tax information...in other words, if you were applying for a permit, you have to give government your tax records...whether it's constitutional or not. That's all I have to say.

Chair Anderson: Thank you. Is there anyone else in the public that would like to give testimony on this agenda item?

Mr. Dahilig: Madam Chair, the Department would recommend closing the public hearing on this particular item.

Chair Anderson: Do I have a motion to close?

Mr. Mahoney: Move to close, Madam Chair.

Mr. Abrams: Second.

Chair Anderson: Any discussion? (None) All those in favor? (Unanimous voice vote) Any opposed? (None) Motion carries 5:0.

- A-2015-1: Request for State Land Use District Boundary Amendment from Agricultural District to Rural District.
- ZA-2015-6: Request for County Zoning Amendment from Agriculture District (A) to Residential District (R-1).
- Location: Kalāheo, Kaua'i. Located along the western side of Pu'u Road, approx. a quarter (1/4) mile west of the Pu'u Road/Papalina Road intersection and immediately adjacent to property identified as 2205 Pu'u Road, and containing a total area of 3.26 acres. Tax Map Key (4) 2-3-004: 006 = *Gregory R. Kingsley, et al.*

Mr. Dahilig: Thank you, Madam Chair. We are now on Item F.b. This is a request for A-2015-1 and ZA-2015-6. This is a request for State Land and County Zoning Boundary Amendments. Tax Map Key (4) 2-6-004 parcel 6. This item has been deferred at the Applicant's request, and again, is asked for deferral again because we are working with the Applicant on another method of achieving their desired outcome with this particular request. So we ask that the Commission

make a call for any testimony. We do not have anybody signed up to testify on this agenda item, but make a call for any further public testimony, and defer the matter until scheduled.

Chair Anderson: Is there anyone in the public that would like to give testimony on this agenda item?

Okay, seeing none. The Department's recommendation is to defer this matter.

Mr. Dahilig: Until scheduled.

Chair Anderson: Until later scheduled. Do we have a motion?

Mr. Mahoney: Madam Chair, move to defer until scheduled as an agenda item.

Mr. Abrams: Second.

Chair Anderson: Okay. Any discussion? (None) All those in favor? (Unanimous voice vote) Any opposed? (None) Motion carries 5:0.

New Public Hearing (NONE)

Mr. Dahilig: Thank you, Madam Chair. We are now on Item F.4., New Public Hearing. We have none for this morning.

CONSENT CALENDAR

Status Reports

2015 Annual Status Report (12/9/15) from Michael J. Belles, Esq., Belles Graham Proudfoot Wilson & Chun, LLP., for Special Management Area Use Permit SMA(U)-2007-13, Project Development Use Permit PDU-2007-25 and Class IV Zoning Permit Z-IV-2007-29, Tax Map Keys 2-8-016:003, 004 and 2-8-015:043, 044, 082, Po'ipū, Kaua'i = SVO Pacific, Inc.

2015 Annual Status Report (3/13/15) from Dustin Rivera, Materials Superintendent, Jas. W. Glover, Ltd., for Class IV Zoning Permit Z-IV-92-38, Use Permit U-92-36 and Special Permit SP-92-6, Tax Map Keys 2-9-006:005, 006 (Por.), Po'ipū, Kaua'i = Grove Farm Company (Owner)/Jas. Glover, Ltd. (Lessee).

Director's Report(s) for Project(s) Scheduled for Agency Hearing, November 10, 2015.

Class IV Zoning Permit Z-IV-2016-4 and Use Permit U-2016-4 to allow conversion of an existing residence into a bed and breakfast operation on a parcel located along the western side of Waha Road within the Shintani Subdivision in Kalāheo, situated at the terminus of Ulu Alii Street, approx. 850 ft. makai of the Ulu Alii Street/Waha Road intersection and further identified

as 3957 Ulu Alii Place, Tax Map Key 2-3-015:052, and containing a total area of 10,042 sq. ft. = Patricia C. Pantone Trust.

Mr. Dahilig: We are now on the Consent Calendar. We have two (2) items up for Status Reports, as well as one (1) item up for receipt and set for hearing for the Planning Commission. We have two (2) Status Reports; one (1) from SVO Pacific related to the Sheraton development, as well as one (1) from Grove Farm and Jas. Glover concerning their materials facility. And then we do have the hearing set for Item G.2.a. This is the bed and breakfast application for Patricia Pantone. Just for the Commissioners' information, there was one (1) item of testimony that was received by the Commission concerning opposition to that application. However, no action is being asked for today, other than to set the item for hearing, so that is the Consent Calendar this morning, Madam Chair.

Chair Anderson: Thank you. Would anyone on the Commission like to take anything off of the Consent Calendar at this time?

Okay, seeing none. Do we have a motion to approve the Consent Calendar?

Mr. Abrams: So moved.

Mr. Mahoney: Second.

Chair Anderson: Any discussion? (None) All those in favor? (Unanimous voice vote) Any opposed? (None) Motion carries 5:0.

EXECUTIVE SESSION (NONE)

Mr. Dahilig: Thank you, Madam Chair. We are now on Item H, which is the Executive Session. We have none scheduled for this morning.

COMMITTEE REPORTS

Subdivision

Mr. Dahilig: Now on Item K, which is the Committee Reports. The Subdivision Committee did meet this morning, Madam Chair.

Mr. Mahoney: Subdivision Committee met this morning. Members present were Sean Mahoney and Louis Abrams. Tentative Subdivision Action, S-2013-23, Roy K. Morita/Marvin M. Morita/Beverly S. Morita, TMK: (4) 4-6-006:017, 019, 020, approved 2:0. Item B, Tentative Subdivision Approval, S-2015-13, A&B/Kukui'ula Development Co., LLC, TMK: (4) 2-6-004:010, 011, 018, 063; 2-6-015:008, recommendation it was approved 2:0. Waioli Surf Shack, S-2016-4, Waioli Surf Shack Holdings, LLC, TMK: (4) 5-5-005:009, 010, recommendation it was voted approved 2:0. Item D, S-2016-5, Pīla'a International/West Beach Kaua'i, LLC, TMK:

(4) 5-1-004:008, 014, 032, approved 2:0. Item E, Brian Lansing, S-2016-6, TMK: (4) 5-1-005:132, approved 2:0. And Final Subdivision Action, Item A, S-2013-22, Cheryl Cowden Schenck, TMK: (4) 4-9-012:005, approved 2:0. Meeting was adjourned at 9:10 a.m. That's all, Madam Chair.

Chair Anderson: Thank you. Does the Commission have any questions regarding the Subdivision Report?

Okay, do we have a motion to approve?

Mr. Abrams: So moved.

Mr. Katayama: Second.

Chair Anderson: All those in favor? (Unanimous voice vote) Any opposed? Seeing none. Motion carries 5:0.

GENERAL BUSINESS MATTERS

Petition to Appeal the Decision of the Planning Director by Jonathan Chun, Esq., representing Brysone K. Nishimoto and Catherine J. Nishimoto related to the forfeiture of Non-Conforming Use Certificate TVNCU #1171 (Ivy Place), Tax Map Key (4) 5-8-4:26, Wainiha, Kaua'i.

Petition to Appeal the Decision of the Planning Director by Jonathan Chun, Esq., representing Todd Schirm related to the forfeiture of Non-Conforming Use Certificate TVNCU #5138 (Hale Cook), Tax Map Key (4) 5-8-9:8, Wainiha, Kaua'i.

Mr. Dahilig: Thank you, Madam Chair. We are now back to Item I, General Business Matters. Item I.1., petition to appeal the decision of the Planning Director by Jonathan Chun, Esq., representing Brysone K. Nishimoto and Catherine J. Nishimoto related to the forfeiture of Non-Conforming Use Certificate TVNCU #1171 (Ivy Place), Tax Map Key (4) 5-8-4 parcel 26 in Wainiha. This is on Page 327 of the PDF, if you're using the iPads. Madam Chair, the Department would recommend requesting referral of the matter to a Hearings Officer for hearing of the appeal.

Mr. Chun: Good morning. Jonathan Chun for both Brysone K. Nishimoto and Catherine J. Nishimoto, Item I.1. And also, since I'm here, on behalf of Item I.2., Todd Schirm. Both of my clients have no objection to the recommendation and request by the Planning Department.

Chair Anderson: Would the Commission like to make a motion now with respect to referral to a Hearings Officer for Item I.1.?

Mr. Dahilig: Madam Chair, if I could also suggest, given the testimony of the counsel for the opposing party, if I may call the second item as well and take it in one (1) motion.

Chair Anderson: Okay.

Mr. Dahilig: Okay. Calling Item I.2., petition to appeal the decision of the Planning Director by Jonathan Chun, Esq., representing Todd Schirm related to the forfeiture of Non-Conforming Use Certificate TVNCU #5138 at Hale Cook, Tax Map Key (4) 5-8-9:8 in Wainiha. Again, the same recommendation, Madam Chair.

Chair Anderson: Okay. Given the recommendations from the Department and the agreement with the Petitioner, do we have a motion regarding referral of these matters to a Hearings Officer?

Mr. Abrams: I make a motion that we have our Clerk appoint a Hearings Officer to conduct a required Contested Case Hearing regarding two (2) appeals, shall we say, and for our Clerk to have the authority to procure and appoint the Hearings Officer on behalf of the Commission.

Chair Anderson: Do I have a second?

Mr. Mahoney: Second.

Chair Anderson: Okay. And discussion? You have a question?

Mr. Ho: I have a question. Is there an intermediate step between going to the Hearings Officer and just...?

Mr. Dahilig: I guess, usually procedurally, what we do is we receive the appeal. At that point, in order to meet certain time clocks, the appeal has to hit the Commission floor within a certain amount of time, so this is meant to meet that requirement. At which time after this, there are discussions that counsel for both the Department, as well as opposing counsel can have concerning settlement before the actual hearing is actually held, so there is that intermediate step. But this procedural step is meant to at least receive the appeal and set the process in motion.

Mr. Ho: Do we have any say? Do we listen on this appeal motion? Or the hearings motion?

Mr. Dahilig: I'll let the Attorney...

Deputy County Attorney Jodi Higuchi-Sayegusa: So if the matter is referred to the Hearings Officer, they hear and receive evidence, and receive proposed Findings of Fact, Conclusions of Law for both parties, and makes a recommendation, adopts one or the other, and then that gets transferred to the record. Also, their recommended proposed Findings of Fact, Decision and Order gets transmitted back to this Commission where you folks may choose to adopt the recommendation, or if there's additional evidence that is missing in the record that you want supplemented, then you can send it back with instructions to the Hearings Officer.

Mr. Ho: Thank you.

Chair Anderson: With that, are there any other questions? Any further discussion?

So we have a motion and a second. All those in favor? (Unanimous voice vote) Any opposed? (None) Motion carries 5:0.

UNFINISHED BUSINESS (For Action)

Letter (7/13/15) from Max Graham, Esq., confirming next status report for SMA(U)-2008-5, Use Permit U-2008-4 and Class IV Zoning Permit Z-IV-2008-6 in the matter of Charles Somers, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and West Sunset 32 Phase 1 LLC is scheduled for September 22, 2015.

Mr. Dahilig: Thank you, Madam Chair. We are now on Item L. This is Unfinished Business for Action. Letter dated 07/13/15 from Max Graham, Esq., confirming next status report for SMA(U)-2008-5, Use Permit U-2008-4, and Class IV Zoning Permit Z-IV-2008-6 in the matter of Charles Somers, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and West Sunset 32 Phase 1 LLC on September 22, 2015. This is Page 357 of the PDF.

Madam Chair, we are coming up on the top of the hour, so I'll leave it up to the Commission on a time management standpoint whether to take this item up now or to maybe take the recess a little bit early and move forward with the 9:01 agenda.

Chair Anderson: I will be recusing myself from this agenda item. Given the timeframe, we will go ahead and take a ten (10) minute recess and begin with the 9:01 agenda at that time. Thank you.

The Commission recessed this portion of the meeting at 9:55 a.m.

(9:01 a.m. agenda taken up at this time; transcribed separately by a court reporter)

The Commission reconvened this portion of the meeting at 11:55 a.m.

Mr. Mahoney: Call the meeting back to order.

Mr. Dahilig: Mr. Chair, we are on Item G.1. This is the status report for 2015 regarding Special Management Area Use Permit SMA(U)-2007-13, Project Development Use...oh sorry, this is the wrong one. My apologies.

Mr. Mahoney: Item L.

Mr. Dahilig: It's the same thing. Letter dated 07/13/15 from Max Graham, Esq. confirming the next status report for SMA(U)-2008-5, Use Permit U-2008-4, and Class IV Zoning Permit Z-IV-2008-6 in the matter of Charles Somers, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and West Sunset 32 Phase 1 LLC is scheduled for September 22, 2015. This is the status report for this particular permit. It's on Page 357 of the PDF. There has also been a supplemental handout that will clarify what the distinction is between those two (2) for

the record. Also, just for the record, the Chair has recused herself from this particular agenda item, Mr. Vice Chair.

Mr. Mahoney: Okay, thank you. Can we have the...?

Jody Galinato: Good afternoon, Mr. Chair and members of the Commission. Just for the background, I have a Supplement No. 2 for the background and additional findings. The status report was last heard on February 24, 2015 before this Commission. The report was deferred for six (6) months to allow the Applicant to resolve issues relating to the compliance with the conditions of approval. The report was, again, deferred to the October 27th Planning Commission meeting. Staff conducted a site visit on October 5th and observed that there have been no changes at the site since the date of the original approval. Included attachments are the original 6th annual status report, minutes from the February 24th Planning Commission meeting for those that weren't here then, and a letter requesting deferrals and then some photos from our site visit. I would defer to the Applicant to explain the differences between the two (2) reports. Actually, this update to the 6th annual status report would kind of be the 7th annual status report. And this application will expire February 15, 2016.

Mr. Mahoney: Thank you. Can we have the Applicant please? Or representative for the Applicant?

Max Graham: Good morning Planning Commission members. I'm Max Graham and I represent the applicant in this matter. This has taken some amount of time since we filed the 6th annual status report because at the request of the Commission, we continued to defer this matter so I could report back. So we are actually to the point where the 7th annual status report is due and I've updated the prior report, and in essence, that's what the update is; it's the 7th annual planning report.

Let me talk about the primary changes since last time we spoke. One (1) is the work to be done on Kahili Quarry Road. If you recall, Kahili Quarry Road runs from Kīlauea Lighthouse Road down to the Fish and Wildlife lot on the makai end. The Fish and Wildlife lot is connected to the Fish and Wildlife Bird Refuge. The access to the ocean goes across the Fish and Wildlife lot. The Fish and Wildlife lot was not actually part of the application. The Applicant does have a duty to maintain Kahili Quarry Road down to the Fish and Wildlife lot, and the Applicant is in contact with Esaki Surveying to prepare the necessary engineering and construction plans to do continued work on the road. The road is passable all the way down to the Fish and Wildlife lot at this point, but it needs to be upgraded a little bit to provide for drainage so that over the long-term the road will remain intact. The Applicant, at the request of the Commission, actually contacted Fish and Wildlife after our last meeting and asked permission to do improvements on the Fish and Wildlife lot because the Fish and Wildlife lot is where the road is in its worst shape because there is no maintenance there. Fish and Wildlife has been engaged in an Environmental Assessment for its...they called it the Fish and Wildlife Service Land Conservation Plan for the refuge area. So they have...it's a new updated plan for all of their facilities there. They wanted to wait to get that EA approved before responding to our request for permission to improve the Fish and Wildlife lot. The EA was approved in September and I've included in my packet an email from the Acting Director saying yes, now we are prepared to allow you, Mr. Somers, the

applicant, to undertake repairs on the road. So that will allow the...after the repairs are done, pretty good access down to the ocean. In order to do that, we need to submit plans to the Fish and Wildlife Service for their review. The County really doesn't have jurisdiction there, other than we have to go through a coastal zone management review process. It's not an SMA; it's the Coastal Zone Management Review in conjunction with the Federal Lands. So we'll do that, and that's going to take...we haven't even started. I just found out about this last week. At the very least though, the road will be improved all the way down to the ocean, and that's been a concern of the community. One (1) of the other matters that the Commission...it's somewhat tangential because it's not required in the eighteen (18) conditions of approval, but the Commission has been concerned about the conservation plan for conservation activities on the property. That plan has been completed in draft form, and submitted to the Hawaiian Island Land Trust. The Applicant proposes to have an area in the makai portion of the property, several acres, for nēnē habitats. Actually, it's for indigenous Hawaiian birds, but primarily it will be the nēnē. So that's one (1) of the aspects of the conservation plan, which by the way, I have attached to the update. The second aspect is the preservation and protection of the archaeological sites on the property. The archaeological sites are spread over approximately twenty (20) acres of the property. The proposal is to preserve and maintain them in accordance with the plan prepared by Cultural Surveys Hawai'i. So I think that's the update right now on what's happening.

Mr. Mahoney: Are there any questions for the Applicant?

Mr. Dahilig: Mr. Vice Chair, I just have...could you just maybe clarify what items have been transmitted over to the land trust at this juncture?

Mr. Graham: The conservation plan,

Mr. Dahilig: Just the conservation plan?

Mr. Graham: Yes. Just to clarify, I gave the Commission a copy of the conservation plan without the exhibits. We...because you already have the exhibits in file, but we transmitted to the Hawaiian Island Land Trust the plan with the archaeological inventory survey and the preservation plan.

Mr. Dahilig: Okay. I guess, Jody, the action the Department is recommending is to, I guess, defer to January, or to receive and then reset for January.

Ms. Galinato: Whatever the Commission prefers. We were just being cognizant of the expiration for February 15th, and the pending application for the caretaker residence in the maintenance barn would be the concern on when that would be coming back. That was waiting on the conservation plan, so I would assume that we are pretty close.

Mr. Dahilig: Really the recommendation then should be to receive and then set an additional status report before the Commission...first meeting in January? Second meeting in January?

Ms. Galinato: I have January 26th.

Mr. Dahilig: January 26th. If the Commission is satisfied with the status report.

Mr. Mahoney: Members?

Mr. Abrams: Can you clarify the February 15, 2016? That is the 5-year period for the building?

Ms. Galinato: For the completion of the...The building is complete. It was from the start of the issuance of the building permit. So basically, the houses have its certificate of occupancy and what we're looking at is the compliance to the conditions of the approval of that original application, and then we've appended an amendment for the construction of the maintenance barn and the caretaker residence.

Mr. Abrams: And that is conditioned on the review of the rest of the conditions that they are in compliance?

Ms. Galinato: Yes.

Mr. Abrams: Max, does this call for you to go meet with the Kīlauea Neighborhood Association about the conservation plan and the plans that deal with the roadway?

Mr. Graham: Well, the conservation plan is a separate matter where we are obligated because there are the conservation easements on the property to submit the plan to the Hawaiian Island Land Trust, so that's just between the Hawaiian Island Land Trust and ourselves. I'll make a copy of the plan available to the Kīlauea Neighborhood Association. The second matter, yes I will inform...I haven't had a chance to yet. I'll inform the Kīlauea Neighborhood Association about the decision by Fish and Wildlife's service and get their input.

Mr. Abrams: And relative to the improvements to the road, so it has been signed off by Fish and Wildlife in regards to that lower area to be improved?

Mr. Graham: They've said in an email they will allow it to be improved and that now that they have made that decision, I should submit the construction plans to them for their review, but of course there are no construction plans yet. We will have to have that engineered.

Mr. Abrams: Jody, were those the two (2) primary concerns?

Ms. Galinato: Those were the primary concerns. There was talk about the P1 pedestrian easement; the old easement that was granted. When we went out on the site visit, the Applicant has given us, the County, permission to go down and survey that, but there is a lot of vegetation there. Just on a side note, that's where a lot of the wildlife habitat is. I did talk to Nani Sadora from Open Space Commission about that because they are the ones interested in the access easement. I'll work with her and the Applicant on...if they want to go out to the site and see it. I don't know that we want to undertake it without that condition there, but that's not my choice.

Mr. Abrams: They want pedestrian access through that area?

Ms. Galinato: There was talk, but we have not staked out that area, but if somebody went out to the site, they could see the condition out there.

Mr. Ho: Is there access to the waterfall now?

Mr. Graham: No.

Mr. Ho: No access to it?

Mr. Graham: Just at the owner's discretion.

Mr. Mahoney: Any other questions? I think we could entertain a motion to receive.

Mr. Katayama: Well, can I just ask sort of a clarifying question? On Condition 12, it states that you maintain the entire length of the Quarry Road, Kahili Quarry Road. What is the long-term relationship with the Federal Government? Federal Wildlife Service? Do you have to go in there and get permission every time you need to touch their portion of the road? Or are you going to gain some kind of easement or access rights? How are you going to maintain that?

Mr. Graham: The original application was only for the portion of the road on the adjacent lot. Kahili Quarry Road is a separate lot of record. The County has an easement, and the Applicant has an easement over the road. So the Applicant has the duty under Condition 12 to maintain the road, Kahili Quarry Road on the adjacent lot. What we never talked about and what was never part of the first application was the fact that the road also continues on the Fish and Wildlife lot. But that Fish and Wildlife lot was never part of the application, and of course, we had no authority over the Federal property. So I guess to answer your question, we are going to have to do it to the extent that we continue to maintain...I'm not sure if we can enter into a long-term agreement with the Fish and Wildlife Service or not, and I will explore that with them. As of right now, we are going to do just the repair right now that we can to make the road usable, and then find out whether they are willing to maintain it. It's possible that Fish and Wildlife could maintain the road once it's repaired.

Mr. Katayama: That is Exhibit 6 that you submitted? That one (1) time access for repair?

Mr. Graham: Yes. So I'll explore that with them.

Mr. Mahoney: Any further questions?

Mr. Katayama: I guess from the Department's point of view, how important is maintaining the entire length of the road? Or is it just on a case-by-case basis that you will hope that the Applicant uses his discretion to maintain it at some service level?

Mr. Dahilig: It's hard for me to judge what kind of commitments or perceptions were made, given that this application was done well before my tenure at the Department and Jody's tenure at the Department. I think the expectation in how the road is maintained consequentially after this initial set of improvements were done, I think is really (1) incumbent on reasonability. Is it

still drivable? Is it not drivable? I mean, I think that's the first one. And secondly, whether or not there's going to be an active attempt to try to impede access once the road is actually built; some kind of malicious actions by either Mr. Somers or the landowner down the line. I think that would be probably the extent of our enforcement on it, but beyond that, in terms of what is the standard of care for the road going forward, I don't have one in mind in particular.

Mr. Katayama: So who is sharing liability on this? Or who is exposed to liability on this? If easements are granted to the public. When you have Federal Government owning a section of it, you have a third party maintaining it, in this case the Applicant.

Mr. Dahilig: That's a question for the Public Works' attorney. (Laughter in background) Jodi's smirking here, but I think that would be a question generally for the Public Works' attorney.

Mr. Katayama: I mean, it's sort of a challenge in terms of responsibility, isn't it?

Mr. Dahilig: I agree. I mean, I think you look at it from a...and the extent of the record I'm limited on because how this condition of approval was actually crafted through that Contested Case Hearing process, my knowledge doesn't go that far. Whether it was something that was affirmatively sought by the Public Works Department or was something that was done as an exaction per community involvement, I'm not sure. Maybe Max can enlighten me on that. I think that would be the perspective on how to look at the handling of the road from a liability standpoint because, again, I don't know who asked for this condition; whether it was really prompted by exaction from public testimony or was it directly from the Department of Public Works, so I don't know if Max wants to weigh-in on that.

Mr. Graham: I can barely remember the hearing. (Laughter in background) And I was there. I'd say it was some combination of the two (2); there was public testimony asking that the road be maintained. I'm not too sure how...I guess the Department of Public Works, because the County has an easement, probably likes the idea of somebody else maintaining that road. The County has an easement over the road, but no obligation to maintain.

Mr. Dahilig: So going back to that question of liability and...

Mr. Katayama: Well no, I think it's more going back to a question of something that is fairly complicated. I think you need to memorialize it somehow with the agreement with the Applicant because it's going to be a long-term legacy issue moving forward.

Mr. Graham: I agree with that because right now all we have is the condition that says there's a responsibility for improvements. It doesn't specify the nature of the improvements, or the standards of the improvements, or the long-term nature of the improvements, so.

Mr. Katayama: Landing a 747 I guess is appropriate.

Mr. Dahilig: And whether that's our agency that's most fit to bind a level of road engineering, I think that's beyond our expertise at this point.

Mr. Katayama: No, I don't think that is the request. Between the Planner Jody, yourself, and the Applicant...

Mr. Dahilig: Yes.

Mr. Katayama: Reach a level of care that is...will sort of shield the County from any kind of litigation.

Mr. Dahilig: We'll take it.

Mr. Mahoney: We'll continue on then. Is there anything further from the Planner?

Ms. Galinato: No.

Mr. Mahoney: Okay. I think it may be in order for the Chair to entertain a motion to receive the status report. We'll have two (2) motions; one (1) to receive and one (1) motion to have another meeting in January for the...what is it? The second?

Mr. Dahilig: Second meeting.

Ms. Galinato: January 26th.

Mr. Mahoney: So the first motion to receive the status report for today.

Mr. Abrams: Move to receive the sixth annual status report for SMA Use Permit SMA(U)-2008-5, Class IV Zoning Permit Z-IV-2008-6, Charles Somers.

Mr. Katayama: Second.

Mr. Mahoney: It's been moved and seconded. Any further discussion? Hearing none. All in favor? (Unanimous voice vote) Opposed? (None) Motion carries 4:0.

Mr. Graham: Thank you very much.

Mr. Mahoney: The second motion would be in order for the status report for the second meeting in January, January 26th.

Mr. Abrams: Motion to have another status report at our January 26, 2016 Commission meeting on these two (2) permits; Charles Somers.

Mr. Mahoney: Do I hear a second?

Mr. Katayama: Second.

Mr. Mahoney: It's been moved and seconded. Any further discussion? Hearing none. All in favor? (Unanimous voice vote) Opposed? (None) The motion carries 4:0. Thank you.

Mr. Graham: Thank you very much.

Mr. Mahoney: We will recess until 1:15 p.m.

The Commission recessed this portion of the meeting at 12:19 p.m.
The Commission reconvened this portion of the meeting at 1:20 p.m.

Chair Anderson: Call this meeting back to order.

Mr. Dahilig: Madam Chair, the Department would request the Commission entertain a motion to reconsider its action on Item K regarding the Committee Reports. Specifically for the purposes of amending the Committee Report related to Item I.1.d. of the Subdivision Committee action this morning.

Chair Anderson: Okay. Do I have a motion for reconsideration?

Mr. Mahoney: Move to reconsider.

Chair Anderson: Thank you.

Mr. Katayama: Second.

Chair Anderson: All those in favor? (Unanimous voice vote) Any opposed? Seeing none. Motion carries 5:0. We will reconsider the matter.

Mr. Mahoney: Madam Chair, I would like to correct the Subdivision Committee Item D, S-2016-5, Pīla‘a International/West Beach Kaua‘i, LLC, TMK: (4) 5-1-004:008, 014, 032, and amend that to...earlier I said it was approved. The motion at the meeting was approved to defer, and I'd like to correct that for the record.

Chair Anderson: So to clarify, the original motion was to approve the Subdivision Committee Report, and you are moving to amend that original motion to change the outcome of the Pīla‘a International/West Beach. As you had stated, there was a mistake and that matter was deferred for sixty (60) days. Is that correct?

Mr. Mahoney: Correct.

Chair Anderson: Okay. So with that, we have a motion to amend. Do I have a second?

Mr. Abrams: Second.

Chair Anderson: All those in favor? (Unanimous voice vote) Any opposed? (None) Motion carries 5:0.

Mr. Mahoney: Thank you.

Chair Anderson: So now we have to go back to the original motion. We have the motion that was amended.

Mr. Dahilig: At this juncture, the Commission can just take a vote to approve that original motion as amended by the last vote.

Chair Anderson: Okay. So, we will...

Mr. Mahoney: Do you need a motion to...?

Chair Anderson: Call the question. Okay, so all those in favor? (Unanimous voice vote) Any opposed? (None) Motion carries 5:0. Okay, we'll move forward. Thank you.

Class IV Zoning Permit Z-IV-2016-1 and Use Permit U-2016-1 to allow conversion of an existing residence into a bed and breakfast operation on a parcel located along the western side of Waha Road within the Shintani Subdivision in Kalāheo, situated approx. 500 ft. makai of the Ulu Alii Street/Waha Road intersection and further identified as 3913 Ulu Alii Street, Tax Map Key 2-3-015:061, and containing a total area of 10,098 sq. ft. = *Monica Jean Adams-Hansen Trust.*

Mr. Dahilig: Thank you, Madam Chair. We are now on Item L.2. This is Class IV Zoning Permit Z-IV-2016-1 and Use Permit U-2016-1 to allow conversion of an existing residence into a bed and breakfast operation on a parcel located along the western side of Waha Road within the Shintani Subdivision in Kalāheo, situated approximately 500 feet makai of the Ulu Alii Street/Waha Road intersection and further identified as 3913 Ulu Alii Street, Tax Map Key 2-3-015:061, and containing a total area of 10,098 square feet. The applicant is the Monica Jean Adams-Hansen Trust. There is a second Supplemental Report pertaining to this matter.

Madam Chair, we were recently made aware via both written and oral communication from counsel for the Applicant that they are not waiving any rights pursuant to HRS Chapter 91. Because HRS Chapter 91 is a Contested Case Hearing statute, further communication, on behalf of the Department, I request orally that the Commission refer this matter over to the Hearings Officer for disposition, given the fact that the Applicant is not waiving any rights pursuant to HRS 91, and that the Clerk of the Commission be in power to procure and appoint a Hearings Officer, and that the Hearings Officer be allowed to conduct an agency hearing and receive evidence, swear in testifiers, and report back to the Commission with a recommended Findings of Fact, Conclusions of Law, Decision and Order for the Commission's further disposition on this application.

Mr. Chun: If I may address the request by the Department.

Chair Anderson: You may.

Mr. Chun: Thank you. Madam Chair and members of the Commission, thank you for being here this afternoon. I just wanted to give some background regarding this matter for those Commission members who weren't here at the initial meeting about a month ago. As some of

the Commission members recall, about a month ago this matter came up for hearing. There was a recommendation by the Department to approve, but they added a condition of approval, and that was the condition that they wanted to have a door, which was through a wall, in order for them to meet their “policy” of having doors in a wall, I guess. But there was an understanding that the structure was built according to plans that the wall that didn’t have the door was approved by the County, and I raised that objection and said hey, you know, why are you requiring a door right now because these building plans were approved by the Department? And the Department responded and said well, we have a policy because we think it’s a lockout and so on and so forth. So what the Applicant did...

Mr. Dahilig: Madam Chair, what we are hearing at this juncture, because we are in a situation where the Applicant wants to conduct this hearing pursuant to HRS 91, I believe that the editorializing of what is going on is not appropriate, given the fact that there is still evidence that needs to be presented for the record. At this point, I would object that Counsel be directed to only address the request on the floor as it pertains to whether or not he, in fact, objects or does not object to my request to move it into a Contested Case Hearing. At this juncture, I believe the Applicant is going into factual circumstances that either have or have not been proven by evidence, and at this juncture, I wish to formalize my objection to the furtherance of his statements at this time.

Mr. Chun: If I may respond. I’m going on exactly what has happened at the last meeting. It’s on the record. They can’t take back what they said or did at the last meeting. I’m just refreshing the memory of some of the Commissioners. I know some of the Commission members weren’t here, and for the Commission members to understand the situation we are in today, I think it would be very helpful for them to understand where we are at now and how we got here today. I don’t think it’s improper for me to go through the record.

Mr. Dahilig: Madam Chair, I believe I still have an objection on the floor at this time.

Chair Anderson: So with respect to the objection, I will let you continue, Mr. Chun, with respect to the request that has been made to the Commission regarding referral to a Hearings Officer. If you’d like to contextualize that and summarize where we got to today, you may, but please keep those remarks brief and address the matter that we have before us.

Mr. Chun: Sure, Madam Chair, I can do that. So going back, the Applicant then went back to the Department and said, well we’re willing to work with you. We’re going to withdraw...we had an application for three (3) bedrooms, and we did it on the record. We said we are going to withdraw. We are going to withdraw two (2) of the bedrooms, we only want one (1) bedroom, and none of the bedrooms we want has anything to do with that guest room that doesn’t have the interior (access). We thought that would be the end of story and that would satisfy the Department because their concern was that it would allow them to “lockout” guests from the main house. So we said okay, we won’t have guests there; that was the intent. We requested that change. The Department came back and said we can’t make a decision on this application. Now, I need another month to look it over and decide whether or not these conditions will still apply. I objected, if you recall, I objected to that saying what do you need, but the Commission said yes, go ahead, take a month, and bring it back. One (1) day after that, I sent an email

specifically to the Department saying these are the reasons why I think the door should not be required. Okay, so it was then. I laid it all on the table...

Mr. Dahilig: Madam Chair, I must object again at this point because we are actually hashing out the record as it's been laid so far, and what has happened since then is that there has been an assertion by the Applicant to not waive his rights pursuant to HRS 91. If he wishes to take the contextualized information and actually argue it on the floor, that should be done pursuant to HRS 91. (Inaudible)

Mr. Chun: Madam Chair, I'm going to object at this point in time. We are having a Director there, sitting as a Clerk of the Department, asking the Chair to do something. Is he going to sit there as a party? Or is he going to sit there as a Clerk of the Commission? One or the other.

Mr. Dahilig: At this point, Madam Chair...

Mr. Chun: Because we are not waiving.

Chair Anderson: So there is the question that was on the floor with respect to the request to defer this matter to a Hearings Officer. If you can answer whether or not your client objects or is...what's the...?

Mr. Chun: We object. The reason why we object is because they had a whole month to review this. They had our objections in writing to review this. I've informed them of our objections with no secret. I did it in public; I did it in an email, a month ago. Now, today, they are acting as it's the first time that I objected to the door. Because it's the first time they object to the door, they want to have a Contested Case Hearing; not I. I did not request for Contested Case. I'm just saying we are not waiving any rights. The Department is acting as it's the first time we ever brought out our objections, and it's not. The Department is now saying, I gather, because they...in the discussions earlier that they don't feel prepared.

Mr. Dahilig: Madam Chair, I must object again.

Mr. Chun: I can argue, Madam Chair.

Mr. Dahilig: I must object again.

Chair Anderson: Okay, so... (gavel)

Mr. Chun: I object to being interrupted on my argument.

Mr. Dahilig: But we are not at a point of arguing, Madam Chair, we're not.

Chair Anderson: I have to call a point of order. We've got to...with respect to the question, I believe it's been answered that you object to referring this matter to a Hearings Officer.

Mr. Chun: I agree, but I have a right to argue that objection in front of the Commission. Just as the Department has a right to articulate the reason why they wanted to have their motion heard. I feel my client has the right to say why they should not be granted. For my client to be limited to just say yes or no, I think, is a violation of my client's rights. Also, I'm going to raise again, and I didn't want to make it this contentious, I met with them and I talked with the Department about this, but that's how the Department wants to do it, so I'm going to raise the objection again. If we are going to go through a, which we...as I stated before, we are in a Contested Case no matter what. It doesn't require a request. But what it does require is a chance in all fairness for my client to have a say in this and a chance in all fairness for the Department and the Commission members to get an understanding of how we got to where we are at; not just I request, and go ahead and vote now. I think the Chair should allow more argument, but if you say no, I'll respect that.

Mr. Dahilig: Madam Chair, if I could just respond.

Chair Anderson: With respect to your argument and your objection, I've heard several different points you've made. If you have additional points that you would like to make, we can give you adequate time.

Mr. Chun: Two (2) more points then.

Chair Anderson: Okay. In terms of the role of the Clerk, whether they are a party, it's recognized that in a Contested Case, we would like to move forward when we have the time and can schedule the appropriate time to take witnesses, to have back and forth, so I will allow additional time for you to state, with respect to the referral to a Hearings Officer. Otherwise, as you know, the Commission also has the right to hear it before the Commission itself.

Mr. Chun: Sure. Quickly. I understand that. Two (2) points. One (1) point that my client wants to make is delay hurts them. They are being punished by the Department for asserting their right under State law, and objecting to the Department's, in our view, unconstitutional taking of their property. So I believe the request for a delay is really a punishment by the County because as I pointed out last time, any delay hurts them. This person...this is their income. They are retired, and all they want to do is be allowed to do what they've been doing for the past twenty-three (23) years, to rent out one (1) room in their home as part of their retirement income. That's it.

The last point I want to make is delay, okay, in terms of timing of the Commission. I understand that's a sensitive issue. I'm only going to call one (1) witness. I don't have any other witnesses to call. I don't think the Department's going to call any other witness, other than the people here; that's two (2) people. I can't see any delay, any great delay on that in terms of the time constraints of the Department. And that's all I have to say.

Mr. Dahilig: Madam Chair, if I could respond. For the limited purpose of...if you'll indulge me, the limited purpose of just this request. I'd like to pass out an email that we received from Mr. Chun and the premise on why we have asked for this procedure to be triggered. I'll go ahead and have this also circulated to Mr. Chun, so he's not... So if you look on the second page

of the memorandum, what was transmitted to Mr. Chun was a copy of Supplement No. 2 to the Director's Report. That's not attached here, but that's what is included in the file. So Supplement No. 2 essentially laid out where we agreed and disagreed based on the month that has gone on. So his reply to Supplemental Report No. 2 was, thanks for the report. Please be advised that my client is not waiving any of her rights regarding HRS 91. This also includes the opportunity for cross-examination under oath. Given the fact that there was a report that was transmitted to Mr. Chun, as contrary to his assertion that we have not been working over the past month to try to resolve this item, we, in fact, produced a report. His response to our transmittal of the report was that my client is not waiving any of her rights pursuant to HRS 91. That's the Contested Case statute under State law. So what is prudent in this fashion, given that this flag has gone up from opposing counsel, is the fact that we need to, on behalf of the County and the Department, take whatever precautionary measures as possible to ensure that the County's rights are not infringed upon if we are going to be conducting a hearing strictly to HRS 91. Hence, because of this communication and subsequent communication that was made orally to my staff members with the intention of Mr. Chun to cross-examine any witnesses we intend to put on the stand, including staff, we, again, find it in the best interest of the County and to assert our rights to ensure that my staff is not subject to witness badgering and is not subject to unfairness as a consequence of being pushed into a Contested Case Hearing immediately. So we believe that our request for referral to a Hearings Officer is proper at this juncture as to ensure fair play for everybody, and it would be done in the manner that has been done for other applications that have also been referred by this Commission to the Hearings Officer for this type of matter.

Mr. Chun: Madam Chair.

Deputy Planning Director Kaaina Hull: If I could also further clarify the Director's statements.

Mr. Chun: Madam Chair, I think the Department should speak with one (1) voice. I would object to two (2) representatives representing the Department.

Chair Anderson: I agree that the Department should speak with one (1) voice. I also agree that there should be no one talking unless they have been acknowledged by the Chair, so please refrain from speaking up until I give permission to the Applicant or to the Department to speak on any matter. Thank you.

So you may respond.

Mr. Chun: If I may, I mean, I've never denied informing the Department that we objected. As I stated, I put that on the record at the last meeting. Also, on September 22nd, if we are going to mention emails, September 22, 2015, an email was sent to the Department outlining in detail the objections we had and the reasons why we feel forcing a homeowner to put a door where a blank wall is now is improper. Again, I go back from September 22, 2015 to this October 22nd, one (1) month, they knew we had objections to that, and they had it in writing, the objections. Now, in terms of cross-examination, and I didn't bring that up, but since it's being brought up by the Department, we did meet yesterday. It was a meeting that I requested, and at that meeting, I offered to say rather than fight about Contested Case or not, I'm willing to sit down with you today and say, can we work out whatever facts that we can have the Commission consider? I'm

willing to stipulate to facts without having cross-examination, without having arguments...we'll argue, but no facts, I mean, that facts are all there. And they said okay, fine, and I said okay. Then they asked me what question would I ask them, and I asked them a question, and they said well that's my answer, because I won't go into the question and answer okay. So that's how it came out; not eh, I was cross-examined. I was asked what questions I would ask them, I was trying to respond to them, and that's how it came. Obviously, we couldn't reach an agreement, so I said fine then we can't reach an agreement. I'll just leave it at that.

Chair Anderson: Okay, thank you. So there, obviously, is a disagreement in terms of moving forward. What's been proposed for the Commission is the request from the Department to move into...to refer this matter to a Hearings Officer for a Contested Case. At this time, I would like to hear from the Commission, if we have a motion on the matter.

Mr. Abrams: I, last time, thought that this could be worked out with time for them to go ahead and do that. Actually, I thought we could have done it at the meeting. I read the Director's Report and looked at what the recommendation is, and prepared to vote on it today. So I'm not really...I'd like to save, I guess, the effort of a Contested Case. I understand relative to that, but to...going into the factual things, but this is fairly straight forward at this point right now, and if it turns out that they don't agree with what the decision of the Planning Commission is, then they can appeal that, too, right?

Chair Anderson: I'd like to have our counsel...

Mr. Abrams: Let's say we have a vote on this issue, and the Applicant would like to appeal it. Would they be able to?

Ms. Higuchi-Sayegusa: They...

Mr. Abrams: They'd have to go to Circuit Court to do it?

Ms. Higuchi-Sayegusa: I'm sorry. So assuming it's denied? If the action is denied?

Mr. Abrams: Whatever. Whatever it is. Yes.

Ms. Higuchi-Sayegusa: Or if there's a condition that's imposed that's objectionable. I mean, yes, there is a mechanism to review it, but I think the issue here now is that the Department doesn't feel that we can go forward without legal representation. So, I mean, you've heard arguments on both sides whether to go today or not, but the fact of the matter is today they did raise the issue that they're not ready to go and do the Contested Case because they are anticipating that certain questions will go into, not just factual questions, but questions that may go to legal questions that they don't have representation or counsel, or evidence at this point to go forward. But that's something that you folks...it's up to you...I mean that's the kind of decision that's before you. Whether to refer it today, allow them time to prepare and go through a formalized hearing process, which is more of the quasi-judicial role that you folks or the Hearings Officer will hear for you and make a recommendation back.

Mr. Katayama: I have a question. So on the agenda before us today is a recommendation to refer this item to a Hearings Officer as a Contested Case Hearing. What are the other choices that we have before us?

Ms. Higuchi-Sayegusa: This body could schedule it and hear the Contested Case, so to act like a judge; a judge with seven (7) heads. But to hear and receive evidence and to receive proposed Findings of Fact, Conclusion of Law based on the evidence that's presented and the testimony that's presented, and make a decision on which to adopt and go forward. Again, that would be based on the evidence, and ultimately decide whether or not to approve or deny the permit. There are two (2) choices with who's hearing the Contested Case. It could either be the Hearings Officer or this body. There's also the...

Mr. Katayama: If the Commission were to decide that there...it should not be handled as a...is that an option...as a Contested Case? Deny what's before us?

Ms. Higuchi-Sayegusa: At this point, it's now this procedural due process kind of issue because at this point, there were already facts contained in the report. Now, there's other questioning that the Applicant's attorney wants to question the Department on the Director's Report to clarify certain facts and then make other legal arguments. At this point, there is sort of a due process, a right to representation issue.

Mr. Chun: Madam Chair, if I may, just one (1) comment; not argue, but... If the Commission wants, my client would be willing to waive certain requirements in order to make this happen today; that offer was open yesterday. And for the Commission, I'm making that offer today, too; if they want. I mean, like I said, no argument, we're willing to do that if that's what the Commission desires.

Mr. Dahilig: Madam Chair, could I respond to that question? That insertion?

Chair Anderson: Yes.

Mr. Dahilig: Madam Chair, the reason why we have requested the Contested Case Hearing is because in previous matters where there has been selective waivers of certain rights, the record has been convoluted and the Commission has, in the past, had to restart Contested Case Hearings as a consequence of selective waivers. Again, our purpose here is wanting to ensure there's fair play; that's why we are asking for this. It's not to be overly cautious, or it's not to be overly burdensome to the Commission, but we do not agree that selective waiver of certain rights is a more judicious, fair, and efficient means of disposing of a case because we've already gone through this similar request one time where the Planning Commission has, in fact, had to restart a whole Contested Case over again. So rather than be passive about it, we're being proactive and saying if we want certain Contested Case Hearing elements to be conducted in a certain manner that is in adversarial means, then we should just start it immediately, versus waiting and trying to, as we go, selectively say we're okay with that procedure and we're not okay with that procedure; as we've tried that once for efficiency reasons, and haste made waste, essentially. So, we would not agree to that.

Mr. Chun: I understand, but if I may.

Chair Anderson: I actually have a question for you.

Mr. Chun: Sure.

Chair Anderson: If there was a Contested Case, and moving forward into a Contested Case, how many witnesses and how long do you think would you estimate that your presentation of evidence would take?

Mr. Chun: As I said, we only have one (1) witness.

Chair Anderson: Okay.

Mr. Chun: And what, fifteen (15), twenty (20) minutes. I don't believe the Department has any more than one (1) witness. Maybe half an hour, forty-five (45) minutes, depending on what they say. I mean, I don't see more than two (2) witnesses total, but you have to ask the Department. In response, they might've gone through a "quasi-contested", but they didn't go through me and I can assure you I am very much aware of what needs to be waived and not waived in a Contested Case. And I will go through, in detail, with the Department what can or can't be done.

Mr. Dahilig: If I could respond to that, Madam Chair.

Chair Anderson: No. I think we need to move forward, so if the Commission has questions for the Department or the Applicant.

Mr. Abrams: First off, I guess for the Department, we're looking at a November 7th deadline? That a decision has to be made unless we're in Contested Case Hearing?

Mr. Dahilig: That's correct.

Mr. Abrams: Okay. The second thing would be, are you referring to the one that got convoluted was the Ben-Dor case that we...that started out and...

Mr. Dahilig: Yes. And at that point it was very clear that we needed legal representation at that time. So in as much as we may be able to try to figure out whether or not something can or cannot be waived, we've realized at that juncture that we needed legal representation to help us through that procedure.

Mr. Abrams: And the last would be, the mere statement of reserving one's rights would in effect be, in your opinion, grounds for having a Contested Case Hearing simply is the best way to go about preserving those rights?

Mr. Dahilig: And those rights, as I being an officer of the County or being (inaudible) on behalf of the County of Kaua'i.

Mr. Abrams: Okay, thank you.

Chair Anderson: Any other questions from the Commission?

Mr. Katayama: I think this is for the Chair. Do you think a twenty (20) minute or thirty (30) minute deferral for the Department and the Applicant to confer would be of any value? Before we take action on this item.

Ms. Higuchi-Sayegusa: Unfortunately now, our office, the County Attorney's office, we've been split in two (2) teams now where there is advice and counsel, and a litigation team. So if it's being referred to our office, requesting legal counsel, unfortunately I'm not sure if...you know, they need some time also to review the case and to adequately represent the Department. That's something to consider. The entire purpose of the Contested Case proceeding is a more formalized process to allow both parties to have ample opportunity to prepare and present evidence, and prepare the case, so that we kind of reach a place of fairness to both parties; so that's something to consider. I'm not sure if the thirty (30) minutes might even be adequate. If, perhaps, you folks didn't want to refer to the Hearings Officer, and you folks are willing to meet prior to the November 7th date, or you know, there are other options to talk about.

Chair Anderson: In terms of the deadline, once we...the Contested Case does not need to be begin before November 7th; we just have to set it.

Ms. Higuchi-Sayegusa: Yes. The November 7th is when the...if it's not kicked to Contested Case, that's...

Mr. Abrams: It's before the 10th meeting, so we would not have a...

Chair Anderson: Okay.

Ms. Higuchi-Sayegusa: I'm just saying I'm not sure if half an hour would be enough for somebody to come downstairs, or at least maybe a couple of days and I can help expedite things with Mauna Kea, my boss, and we can get (inaudible).

Mr. Katayama: Let me take a step back. The issues before us, or the issue before us, I don't know if it rises to the complexity that we need to go through a Contested Case. Now if there is some way of bridging this...I understand both positions, and because of the not waiving any of the Applicant's rights under Chapter 91, the Department needs to respect that. But in terms of process, in terms of the issue on this application, it seems that it's not that complex legally or in terms of the issues involved that the County and the Applicant needs to go through the quite burdensome process of a Contested Case. Now, you know, we could vote to send this to a Hearings Officer. In the meantime, if the Department and the Applicant and the County can broker a resolution or come to some kind of agreement that would be perfect. I'm just trying to understand the options and the most expedient way of addressing this application.

Mr. Chun: Madam Chair, if I may, not for argument for us, but maybe an idea would be to take the other applicant from the other matter first, and we can discuss it later. I mean, because you

have another applicant waiting behind, so maybe that would be a good segue to maybe we should talk, but you can call the other applicant.

Chair Anderson: If there's interest here for the Commission to table this matter to the end of today's agenda and return to it, so that we can address the other matters. I would need a motion to table the matter.

Mr. Abrams: Move to table this matter to the end of the agenda.

Chair Anderson: Okay. Do I have a second?

Mr. Katayama: Second.

Chair Anderson: Okay. All those in favor? (Unanimous voice vote) Any opposed? (None) Okay, motion carries 5:0. We'll table this and take it up after the last agenda item.

NEW BUSINESS

Class IV Zoning Permit Z-IV-2016-3 and Use Permit U-2016-3 to facilitate conversion of a portable into an administration building and to accommodate future school improvements that includes classrooms and a gymnasium on the St. Catherine's Church/School campus, situated at the Kawaihau Road/Hauaala Road intersection and further identified as Tax Map Keys (4) 4-6-015:058, 060, 064 and 067, and containing a total area of approx. 11.76 acres = Roman Catholic Church.

Mr. Hull: Madam Chair, we are now on Agenda Item referenced under F.2.a. Class IV Zoning Permit Z-IV-2016-3 and Use Permit U-2016-3 to facilitate conversion of a portable into an administration building and to accommodate future school improvements that includes classrooms and a gymnasium on the St. Catherine's School campus, situated at the Kawaihau Road/Hauaala Road intersection and further identified as Tax Map Keys (4) 4-6-015: 058, 060, 064, 067, and containing a total area of approximately 11.76 acres.

Jody is our Planner on this.

Chair Anderson: Okay, if we can hear from the Planner.

Ms. Galinato: Good afternoon, Madam Chair. With your permission, I can make this pretty short. Okay.

Ms. Galinato read a summary of the Actions Required, Project Description and Use, Legal Requirements, Findings, and Preliminary Evaluation sections of the Director's Report for the record (on file with the Planning Department).

Ms. Galinato: I'll hold off on my conclusion until after the Applicant speaks.

Chair Anderson: Is the Applicant here? If you could please step forward.

Celina Haigh: I'm Celina Haigh, Principal of St. Catherine's School.

Marc Ventura: Hi. I'm Marc Ventura, Architect working with St. Catherine's project.

Chair Anderson: Thank you. Do you have anything additional that you would like to add to your petition?

Ms. Haigh: No, it was all included.

Chair Anderson: Okay. And any comments on the Director's Report?

Ms. Haigh: No. It's correct.

Chair Anderson: So if we can go ahead and move forward with the recommendations.

Ms. Galinato: Based on the foregoing conclusion, it is recommended that Class IV Zoning Permit Z-IV-2015-19 and Use Permit U-2015-18 be approved, subject to the following conditions.

Madam Chair, I have ten (10) conditions. If you'd like me to read them onto the record, I will.

Chair Anderson: It's not necessary.

Ms. Galinato: Okay.

Chair Anderson: Is the Applicant in agreement with the conditions as set forth?

Ms. Haigh: Yes.

Chair Anderson: Does the Commission have any questions for the Applicant or the Planner at this time?

Do I have a motion from the Commission?

Mr. Mahoney: Madam Chair, I'd like to move to approve Class IV Zoning Permit Z-IV-2016-3 and Use Permit U-2016-3.

Mr. Abrams: Second.

Chair Anderson: Okay. Any discussion? (None) All those in favor? (Unanimous voice vote) Any opposed? (None) Okay, motion carries 5:0. Thank you.

Ms. Haigh: Thank you.

Mr. Ventura: Thank you. Appreciate it.

Zoning Amendment ZA-2015-7: A bill for an ordinance amending Chapter 8, Kaua'i County Code 1987, as amended, to establish a process to permit Homestays in the Commercial Districts, Resort Zoning Districts and Residential Zoning Districts = County of Kaua'i, Planning Department.

Deputy Director Hull: Madam Chair, we are now on Agenda Item F.3.a., Zoning Amendment ZA-2015-7: a bill for an ordinance amending Chapter 8 of the Kaua'i County Code 1987, as amended, to establish a process to permit Homestays in the Commercial Districts, Resort Districts, and Residential Zoning Districts. The applicant is the County of Kaua'i, Planning Department, and there is a Supplement No. 1 to the Director's Report. I am actually handling this particular item.

The report has been received for the record. So just to summarize, originally when the Department introduced the proposed draft amendment, it was to (1) establish development standards for Homestay operations that are similar in nature to those same development standards that are imposed across the board on Transient Vacation Rental operations in being that they are similar in providing accommodations for transient guests. In addition to establishing those standards, the Department was looking at a possible venue or way to facilitate an over-the-counter review process for Homestay permits in the Residential Zoning District. Currently, there are no development standards and all Homestays have to go through the Use Permit process. We took a few months to meet with various groups, neighborhood type groups, both for...you know, some that had criticisms or objections to Homestay operations to those groups that are in favor of Homestay operations. After having met with these groups and individuals of the public, the Department has the proposed draft amendment, which was submitted to you folks in the packet, and we have ultimately come to the conclusion that facilitating or establishing a route whereby some Homestay permits can be approved over-the-counter that, in fact, it may not be appropriate to propose that type of venue or avenue. So we've essentially recommended removal of the minor/major permitting processes, as well as the quota system as its established in the Census Designated Places, and essentially just establishing that all Homestay applications in the Residential District be done via the Use Permit process, and that we still maintain that they should be outright permitted in the Residential Districts in the Visitor Destination Area. We still hold to those development standards initially proposed be held on these accommodation type units, and we still hold that the possible avenue of having Homestays in the Agricultural Zoning District and Open Zoning District actually be prohibited. And we are available for questions.

Chair Anderson: Do you have questions?

Mr. Ho: Kaaina, you have a minor and a major. The difference being just the number of bedrooms used for occupancy?

Mr. Hull: That was under the original proposal. The minor being two (2) bedrooms or less, and the major being between three (3) to four (4) to five (5) bedrooms. That was essentially a way to facilitate the minor process for some Homestays in the Residential District. Because we are

doing away with that over-the-counter permitting process, we are just saying there is no difference between a minor and a major Homestay; a Homestay is a Homestay. If proposed in the Residential Zoning District outside of the VDA, they all have to, essentially, come before this body and be reviewed for approval.

Mr. Ho: In it you have conditions to revoke the permit, and one (1) of them was if neighbors complain of noise in the area. I see in one (1) portion here in rereading it that it almost...it was one (1) complaint and then it seems like there was a neighborhood complaint board; more than one (1) neighbor had to complain. Are you going down the road of the "Barking Dog" thing?

Mr. Hull: No, no, no. Actually the original establishment of that one (1) complaint was under the original proposal of having an over-the-counter process for some applications that the applicant, if they are applying for a minor over-the-counter permit, would have to notify the abutting property owners. If a single property owner objected to the minor over-the-counter process, it doesn't deny it, it just bumps it up to the major, and has the applicant come before this body to apply for a Use Permit. So it wasn't like one (1) neighbor objects and the issue is done. It is one (1) neighbor objects to the possibility of a ministerial over-the-counter review. They would still be able to come before this body and you, as a body, would have reviewed whether or not it was appropriate for the area. Being that we are getting rid of the over-the-counter process, that mechanism was removed because of the fact that all applicants will have to get Use Permits. Secondly, for all Use Permits that are issued, if there are enough complaints that come say to the Department and the Department determines that, in fact, there may be some compatibility issues, we can bring the application back to this Commission for review and possible revocation. So that is already established under current law.

Chair Anderson: Other questions?

Mr. Abrams: Yes. Kaaina, the Homestay that would happen in a VDA area, why are we differentiating that between getting a permit for in the VDA where regular single-family dwellings that do vacation rentals in the VDA area don't need anything?

Mr. Hull: Currently under the existing...I believe, and I'll have to double-check, but I believe under the existing TVR Ordinance 904 that those in the VDA are not subject to the development standards of the TVR ordinance. That being the case, the Department feels that is somewhat problematic. That development standards for transient accommodation should be applied, as far as having the notice of neighborly...safety responses and what not, and having a public placard identifying that as a TVR or a transient accommodation should be applied. So we are saying granted we recognize it is in the TVR ordinance, quite frankly, the Department's position is it should be and it should also be in the Homestay ordinance as well.

Mr. Abrams: Okay. So someone who is doing a vacation rental of the whole house in the VDA area would not have to go through the same standards as a Homestay?

Mr. Hull: They are not required to do the renewal and they are not required to have those...let me reference the actual...excuse me. So yes, they are not required. If you look at the development standards for Homestays under our proposed 8-18.2, you should have everything

from, each bedroom use should have an off-street parking stall, the residential structure shall be serviced by a septic system approved by the State Department of Health, as well as the signage identifying and having 24-hour contact information for emergency purposes, and then there's something concerning providing information for the safety and comfort of your neighbors. Those are all development standards that were established for TVRs outside of the VDA. Quite frankly, the Department is of a position that it should be imposed upon TVRs as well, and we may be returning to the TVR ordinance just as good practice. Right now we have before us the Homestay ordinance, so we are saying all transient accommodations under the Homestay should be subject to these requirements.

Mr. Abrams: Okay.

Mr. Hull: But yes, you are correct, Commissioner. There is incongruity in the two (2) laws. We are not skirting that issue.

Mr. Abrams: Yes, because I see some of these development standards may be onerous for some of the properties that are in the VDA who don't have a...basically a wastewater system, a septic system.

Mr. Hull: Yes. That was one that came up and it actually came up in a lot of discussions for Homestay applications that were before this body. In looking at it in particular, you know, especially with the TVRs, to a certain degree it was a missed opportunity. If you look at someplace like Hanalei Bay, and the amount of wastewater issues that they are having with their water contamination, and that place is virtually 70, 80, possibly 90% transient vacation rental, non-conforming use certificate holders. If that position had been required of them, there's a strong possibility they would not have the pollution issues that they are having right now in the bay. So the Department does look at that with the TVR ordinance as having been a missed opportunity, and there is no reason that we should possibly...because it is incongruous with the TVR ordinance, to say we shouldn't have it imposed upon the Homestay operations.

Mr. Abrams: But those are outside of the VDA.

Mr. Hull: What's that?

Mr. Abrams: Hanalei Bay is outside.

Mr. Hull: Correct, correct.

Mr. Abrams: So that's where I'm...I get it. I would prefer that it would be left up to the Health Department to make those determinations because they already had and allowed occupants in a house. If you are, in effect, renting out a room, it would be roughly the same amount of occupants in that house, whether it was a single-family owner-occupant there with children, or whether or not it was a long-term rental, so the Health Department has done that. Eventually the Health Department has made attempts, and is moving in that direction, to require conversion of wastewater systems that are not...at minimum septic, but I'm not sure whether or not that is this one there.

Let's see. The aspect of agriculture, or prohibited in Ag and Open. Have you considered anything about the smaller lots that are Ag or Open that are much more difficult to farm would be something that might be a criteria size-wise of the lot in order to do something like that? Or would only allow one (1) dwelling?

Mr. Hull: You know, there is some issue with the topography, and the Department acknowledges that. Concerning the size of the lot, that has come up a fair amount in various applications for Special Permits in using the size as a factor in why they cannot actually farm the lot. Yet, we've had testimony before this body say when you had the farmworker housing ordinance where you had actual farmers coming in saying, I have a one (1) acre lot and I can make \$35,000 off of this for that ratio for the farmworker housing. So it has been used as a reason and it's also been demonstrated through other farmers that it can be done as far as the lot size is concerned. The Department is not going to skirt around and say that there may be avenues under which Farmstays can be reviewed, but our position is that while ag tourism can supplant a farm operation's income and help keep that farm alive, over the past several years having watched the outcome of overnight accommodations and because they have become so lucrative that they have ultimately been damaging to ag lands as a whole. And to say while there might be (inaudible), right now we need a cooling off period of saying too much abuse has gone on. Leaving a certain wedge while simultaneously not tackling a true definition of "ag" that will ensure that it actually is a true, legitimate, bona fide farming operation, without that definition there and a standard for us to hold up, the loopholes and the wedges that can be made by applicants exploiting that lack of definition, that lack of standard, we just don't want that leeway there, quite frankly. We've seen it abused ad nauseam and so we're saying that right now, we are recommending an all-out prohibition.

Mr. Abrams: The County of Maui has Homestay operations on agricultural land over there?

Mr. Hull: Correct.

Mr. Abrams: And do you know whether or not they are experiencing that same type of problem?

Mr. Hull: In discussions with some of the staff over there, they did acknowledge that some of the standards are to a certain degree...they are grappling with the same problem this County is grappling with, the entire State is grappling with. Without an actual definition of "ag" that succinctly demonstrates that definitively that this is an actual farm, we'll always be wrestling with whether or not it's a bona fide farm.

Mr. Abrams: So we have some provisions in here for the Census Designated Place. Is that still part of this Exhibit B?

Mr. Hull: No. So the CDP, or Census Designated Place, was established to create a ratio system whereby we could permit over-the-counter Homestay applications at a certain ratio to the respective CDP; at a ratio of 1 per 300. Because we are doing away with the over-the-counter system, the necessity for a CDP mechanism is no longer there.

Mr. Abrams: I have in Exhibit B on Page 1, we have that, so it's just defined, but basically not part of the...? It shows it underlined, so I'm not quite sure whether or not that's in or out or...

Mr. Hull: Exhibit A is our current ordinance draft proposal. Exhibit B was the former one that you folks had.

Mr. Abrams: The former one?

Mr. Hull: Yes, the former one. We've amended it, and Exhibit A is what we're recommending be moved to Council.

Mr. Abrams: Okay, thank you.

Chair Anderson: Any questions on this side of the Commission?

Mr. Katayama: Under the proposed ordinance, how does the Department plan to monitor or regulate the number of Homestays in any geographic location? And does it make a distinction between active Homestays? Because right now, under the current method of Use Permits, it runs with the land. So if a person gets a Use Permit, they sell the property or transfer the property, and the person that acquires that chooses not to have a Homestay, how do you manage that quota? Is it just a number of Homestay applications that you allow in a neighborhood? Or is it the number of active Homestays? Because revocation of these things become quite tedious.

Mr. Hull: Yes. Being that we are getting rid of the ratio, we wouldn't necessarily be actively monitoring or saying that this amount can be permitted in respect to your neighborhood. As far as them staying active, you are correct in the assessment of the County Attorney that these entitlements run with the land. With the mechanism for renewal, there is that mechanism to essentially...if they fail to renew, to deactivate the permits. But as you folks have become savvy and when we issued that cease and desist (inaudible) to renew, we do also have to include language that they have the right to appeal, and to appeal it to this body in particular; some have opted to do that in the TVR realm. In some of the existing Homestay permits, we know that there are some out there that were permitted several years ago that are no longer active. The entitlement still runs with the land, but they are no longer active. And I think that might speak to...I think at the last meeting, the Chair requested that we look into the licensing issue, which would essentially tackle that notion of running with the land and the problems that can ensue with that. On the planning side, we did have discussions like with the Liquor Department. Quite frankly while it is an avenue, it would require a fair amount of resources and restructure in the Department that right now, given our resources and our lack of staffing right now, we would have to advise against that. I know there may be some legal issues, but as far as resource-wise, the Department isn't ready for that kind of shift.

Mr. Katayama: Well, isn't the central issue on Homestays is a concentration within any given community that will, at some point, bear a burden or be viewed as a burden? I think in one (1) of the letters to the Commission in a Homestay application before us today was a comment of on-street parking, for example. If that is the sort of key metric of whether you should allow Homestays to happen in a neighborhood, wouldn't you want to take a path that will allow you to

regulate that on a timelier basis? As opposed to going through a permitting basis, which is, again, very difficult and it could be very lengthy depending on the applicant. Because a simple non-renewal can turn out to be a legal proceeding. As opposed to something less binding and I mean, a license is one word for it, but can we craft a different pathway that keeps the Department focused on planning issues, as opposed to compliance issues. The more and more of these things that we pass, the compliance element to the Department gets more weighty and not less weighty. The traditional, to me, the permit system is great if it is intended to be changing the nature of the use of that community. However, I don't think Homestays are intended to be that, but more of a temporary vehicle where the choice of the homeowner, in this case, because it's quite clearly stated in the ordinance, they can choose either to do it or not. If they do, we should provide them sort of an easy, a less painful way than a permitting process to allow them to do it. But, if they choose to cease, then that will be just as convenient for the Department to extinguish that benefit for them.

Mr. Hull: In response to that, in looking at the licensing was a definite avenue, I think, for that. Like I said, our resources are lacking right now, quite frankly.

Mr. Katayama: I think it's a (inaudible) resource the Department is there.

Mr. Hull: But then also to address...because a lot of this goes into what's happening with the TVRs, and indeed a licensing route would have been a bit more manageable than a permitting route that we're seeing with the TVRs. As far as the Homestays are concerned, while there are individuals that desire to have Homestays out there, you guys are reviewing a fair amount right now, and a lot of that is more of a consequence of our enforcement actions against illegal operations out there. Since the new law was adopted with the new definition of "Homestays", there was this mindset that everybody's going to...because the cap was imposed, right, the cap of ten (10). There was this belief that the Department is going to have problems because there is going to be this rush to the door. As of this date, and that cap was imposed back in April I want to say, April or May, we have gotten three (3) applications. There is no rush to the door, while there is a huge desire for TVR usage and TVR permits. The Homestay demand for permits out there, while there is a demand to get these permits, is nowhere near as high and burdensome as the TVR demand.

Chair Anderson: I'll let...Counsel, if you wanted to speak to the license issue as well. I know you've done some research on this.

Deputy County Attorney Jodi Higuchi-Sayegusa: Sure. So when you are dealing with private property and especially when you are dealing with governing use under the County zoning authority, really it's something that it's a right, more of a right that runs with the land. The question on whether the County can issue something less of a property right, there's various case law there and other jurisdictions that may...there's other decisions out there with varying results, but the majority and kind of a fundamental starting point and a principle is that these permits are entitlements that run with the land. But there are other mechanisms that the County could institute that will help to maintain a level of control under...and be within the authority of the zoning and police powers authority; whether that be issuing time restraints, reasonable, and it has to be linked to some sort of public benefit or public welfare and safety, an interest that's

consistent with the police power and the zoning interests. But you could look at reasonable time limits, something like the renewals that will allow for...if somebody like you, say in your question, if there is somebody that is trying to...it's resold and they don't engage in the Homestay operation and they don't submit for renewal, then it would be kind of a phase out. They would be, technically, in non-compliance. If later on down the road they try to engage in the use again, but without the renewal, they will be given a chance to appeal that. When you are dealing with the property right, which again, runs with the land, you need to afford for constitutional, procedural processes allowing the party to review it and to appeal. That's, I guess, the short synopsis of what I've researched so far. Again, you can look at time limitations, you could target a specific impact by putting an appropriate condition in place per permit.

Mr. Katayama: Is there a way to distinguish the underlying use of the land versus what is happening on top of the land? For example, a zipline. When we grant a Special Use Permit for that in an Ag Zone or Conservation Zone, technically, that goes on forever on whatever area that is designated the zipline property. Okay, and we've done that. If you are a shopping center that says I want to apply for a Liquor license, it's still a Commercial Zoned property and you are allowed to have certain activities, but within that, you have a Liquor license element that extinguishes with that person. It doesn't stay with the shopping center. What are those kind of differences in property use than what we are talking about in the Homestays? Because it's really...we are not changing the underlying fundamentals of that property. It's still residential or...it's just that they want to allow a temporary stay.

Ms. Higuchi-Sayegusa: Right. So the Counties are only...we have limited authorities. We exist because we are given certain powers. When you look at licensing, in particular Liquor licensing, the Counties get to have the authority to license liquor because it's given to us; i.e. The U.S. Constitution may even allow for the States to regulate liquor, and then the State gives it to the Counties, specifically creating the Liquor Commissions. We receive our power to zone through the State giving that power over to the Counties, and so we don't have an inherent power to license businesses.

Mr. Katayama: But we have an inherent power to license real estate; metes and bounds.

Ms. Higuchi-Sayegusa: We have the power to zone, which is to direct in which areas certain types of activity.

Mr. Katayama: No, no, but within that area, I mean, a lot of these applications are licenses, which can be extinguished.

Ms. Higuchi-Sayegusa: We look at land use, so that the types of...so I'm distinguishing it between licensing the business, which is the liquor analogy, versus the types of...

Mr. Katayama: Well no, let's take the zipline.

Ms. Higuchi-Sayegusa: Okay.

Mr. Katayama: If an applicant comes in with a license to operate a zipline and that license is extinguished with the owner, the licensee, what happens to that Use Permit?

Ms. Higuchi-Sayegusa: The entitlement to engage in an activity runs with the land, whether they require other business licensing, I'm not sure, State licensing of some sort. That's a separate issue, but it's where certain activities can take place and whether that entitlement remains there.

Mr. Katayama: Can the licensor move that designation anywhere they want and maintain the use?

Ms. Higuchi-Sayegusa: No. Well, as far as the zoning, you know, the zoning which is where that...

Mr. Katayama: No, I'm saying...I'm talking specifically on the Use Permit that we granted.

Ms. Higuchi-Sayegusa: I'm sorry. To be honest, I'm not familiar with the exact parameters of what that permit said or I wasn't part of that discussion back then, but...

Mr. Katayama: No, I mean, that's okay. I don't want to take any more time, but I guess I'm trying to get the differences...I understand the entitlements with the land and in some cases that's very important because it ensures unbridled use that we've agreed that it's appropriate for that designation. Others to me are more fungible, and the further you get closer to a very fungible activity within a community, I think the Department should have ability to regulate that with the least amount of procedural issues. That's what I'm trying to weigh. I'm not trying to rewrite Constitution, I'm not trying to rewrite law. I'm just trying to keep the County Planning Department in the planning business.

Ms. Higuchi-Sayegusa: Right, right. And like I said, there are mechanisms that the Department has looked at, or you folks can also look at, in amending whatever iteration of the amendment is; i.e. the renewal, but also accounting for the appeal process to phase out or to revoke any entitlement, what other conditions you can impose or structure into the ordinance to help achieve that.

Mr. Katayama: If we are tying this to property rights, I think it should be very onerous to take that away. I think that's very important. If we are saying that you can use it, I think I'm a little more flexible on that. That's the only thing I'm saying.

Mr. Hull: I think what it ultimately buries down to is the fact that we can establish...in discussing with Jodi offline, we can establish a licensing procedure, but we would have to be first entitled to do that. So we'd first have to take a measure of saying, yes indeed they are outright permitted zoning-wise in the Residential District, and now let's thereafter establish a licensing procedure to permit some of these.

Mr. Katayama: Fair enough. One (1) last thing is that we had testimony this morning from three (3) people and I thought some of their additions to the ordinance were...should receive some kind of consideration. I don't know the mechanism to do that because it's really difficult to sort

of...they were using a form of the ordinance that has been already replaced. So just kind of looking at the (inaudible) versions made me go cross-eyed, but I think you guys should take a look at it and see if any of these are worthy enough to be incorporated in the ordinance moving forward.

Mr. Hull: Yes, and definitely to that point, Commissioner, the Department, right now in looking at it briefly, wouldn't necessarily have an objection to those proposals. What they are essentially trying to do is they are trying to use the quota system to establish...using our ratio quota system that we had originally proposed for the minor permitting process, they want to take that...they are proposing to use that as a quota system for Use Permits, so that there actually would be a limit island-wide on how many of these permits would be given. The Department wouldn't necessarily have an objection. If the Commission wants us to entertain that further, we can. I can say that what they are specifically proposing...the way that they would legally draft it, it would need to be reworked to capture their intent, but that's for this body to discuss whether or not you would want to go to that level.

Mr. Katayama: Thank you.

Mr. Abrams: Kaaina, prior to this, before you eliminated it, did you look at the CDPs and how many Homestay operations would be allowed under that process? Because I know we had asked about how many census districts there are, CDPs...

Mr. Hull: We didn't actually break down the specific number because if you take the ratio of 1 per 300 and then you take our census population for the island, which is 70,000, you have roughly 233 some odd Homestays. But there are some CDPs that wouldn't qualify for it, right, like Pākalā would not qualify for it because they don't have...at least what we were proposing originally is you have to be a CDP of over 1,000 residents in order to begin to qualify for Homestay applications, and then at a ratio of 1 per 300. So no, Commissioner, sorry, we didn't breakdown the specifics of...

Mr. Abrams: If you do decide to incorporate some of that in, I'd like to be able to have an opportunity to take a look at it and see what that would mean to the island in regards to total of units that would be available.

Mr. Hull: I can state that the Department wouldn't necessarily have an objection to the intention of what those individuals were proposing, but also say the Department is ready for our proposal as well if this body is ready to act on it and to move it up to Council. So I think it's just the prerogative of this Commission if you'd like to take action on our recommendation as officially submitted to you, or if you are directing the Department to incorporate some of those...the intention of the public's testimony today.

Mr. Abrams: So your evaluation was...1 per 300 in discussion with the public has been apparent concerns over the inequity of the matter then is mainly the...

Mr. Hull: That's the one (1) issue that would arise, possibly, of what those testifiers are proposing is that there was at least fears in the public in various groups of talking of equity and

distribution. Say if you do have a quota system, one (1) applicant can come in, and be the last person, and might have what is not the best or most compatible use, and it's approved. And then the guy behind him could have a far more compatible, far more marketable product, but have no chance of getting it. So that would be one (1) of the issues with the quota system.

Mr. Abrams: And with the larger properties, they'd all come in front of the Commission, so there would be some sort of further evaluation on larger homes, right?

Mr. Hull: Right.

Mr. Abrams: Okay.

Chair Anderson: I had a question on one (1) of the recommendations that was made in the public testimony today was the increase of the renewal fee. What's the Department's stance on that? On whether or not there's proportionality and how that number, as opposed to the \$750.00 amount was arrived at?

Mr. Hull: The \$750.00 amount was arrived at in the same review process that the transient vacation rentals were submitted to. They are required to...virtually an identical renewal process, as far as the development standards they have to submit, the paperwork they will be required to submit to the Planning Department, the review on behalf of the Department, so we assessed that it should be in the same amount, \$750.00. This is one (1) area somewhat vice versa to our position on the septic system, whereas the TVRs are being required to submit \$750.00 and quite frankly, there is probably less work that is going to go into...or possibly less work...excuse me, the same amount of work will be going into it and so we shouldn't be punishing, necessarily, the Homestay operations. If this body wanted to entertain pushing the TVR up to \$1,500.00, we can have the discussion on a later agenda.

Mr. Abrams: Well it seems like you are going to be reviewing it along the same standards of any renewal, so the amount of workload is going to be about the same no matter what.

Mr. Hull: Yes.

Chair Anderson: Are there any further questions from the Commission on this matter?

Mr. Katayama: How would the Chair like to address some of the recommendations provided by testimony this morning, relative to the proposed ordinance?

Chair Anderson: Just a question to the Department. The recommendations that were given today, was this the first time the Department has seen these changes?

Mr. Hull: The Department met with those individuals over the course of the past few months, and we discussed our draft proposal last week, and they've kind of given the thumbs up on that. They kind of did today, but also saying let's go a little bit further and we only saw this, this morning.

Chair Anderson: Okay. Just in terms of my particular take, I know this is a process that's going on and even after we make our recommendations, it's going to continue to be amended. I think it's important to, perhaps, take some additional time to see if there are some changes to be made to incorporate; that would be where I would stand.

Mr. Abrams: Madam Chair?

Chair Anderson: Yes.

Mr. Abrams: Kaaina, were these ones that were brought up some of the same issues? I mean, just because you only saw these in this particular draft, it wasn't that you didn't think about almost all of these things in regards to putting together Exhibit A, I guess, at that point where we have carrying capacity, census designated place, definition of a Homestay, quota system, you know, that type of thing.

Mr. Hull: There are some things in here the Department would say probably shouldn't be done. I think one (1) of the proposals state to amend the public hearing notice requirement to 500 feet around the proposed site, which isn't necessarily a bad idea, but it holds them at a different standard from other Use Permits required at the 300 feet. Like somewhat of the \$1,500.00 recommendation, if this body wants to look at expanding the public notification for all applicants to 500 feet, we can entertain that, but to single out Homestays in that manner, we would disagree with. There's things like the carrying capacity, which is an important idea in land use planning; however, using it within specific regulations becomes a bit dicey because there are no specific measures for the Department or this body to look into. So there are some things that the Department does have an issue with. As I take it on the face value, the biggest thing it's proposing, and what seems to be most central to it, is imposing a quota system on the Use Permits approved. I guess the Department doesn't necessarily object to that. There will be, I think to a certain degree, some questions of equity from members of the public of imposing a quota system. So I think for the Department, in an action from this body, the Department is still recommending the Exhibit A draft proposal; however, if this body would like the Department to go back to incorporate this quota system, we can do that as well, but that's essentially the prerogative of this body.

Mr. Abrams: Basically what you are saying is we are going to have to tell you to do that.
(Laughter in background)

Chair Anderson: One (1) of the things that comes out in...the quota system, it does present some problems and we've discussed, and that was part of why we've asked the Department to look into the licensing because at least then it's not a permanent permit that runs with the land; that there could be some turnover in the licensing. But I think I'd like to see the analysis with respect to how the quota system would align with, for example, smart growth policies. If we want to look at trying to locate our TVRs in certain areas in which there are, for example, walkability, so that we are reducing demands on the roads and traffic. So if we want to, kind of, be proactive and give a preference for Homestays in particular areas because they will alleviate some issues in traffic. I think that may be a concern, but I'd like to see the analysis there because there may be

other issues that the particular people staying in the Homestays may still require cars because they want to see all over the island, or not necessarily working, those types of things.

Any other questions? Comments for the Department? If the Commission...if we are not going to entertain a motion here to make recommendations, then I would want to ask the Commission if we do have a motion. If we do not, it appears that there may be some additional work that we'd like to see on this.

Mr. Abrams: Well I'm prepared to go ahead and make a motion to accept what is in Exhibit A from the Department's recommendation after reading all of that, so I would make that motion.

Chair Anderson: Do I have a second?

Mr. Mahoney: I would second that motion.

Chair Anderson: Discussion?

Mr. Abrams: My discussion is, I mean, I've looked at all of those. What you were talking about, I think, may come down the line a little bit later, but in terms of smart growth and walkability, although the given is if somebody's visiting here, they are going to want to get around and see the island. Unless we have systems that allow that, you're going to have that. But I consider that somewhat minor to the fact that what's going to be there because a lot of these old areas right now are going to be, whether they are on ag land or they don't have a septic system, they are going to be ruled out, so ultimately, I don't think it's going to be a real big deal. I think that this would be something that I see coming in the future and these particular criteria seem to be perfectly adequate.

Chair Anderson: Okay.

Mr. Katayama: From a carrying capacity, how is the Commission gaining a sense of what is the appropriate number of permits to issue in any given neighborhood? I mean, what help are we going to get if we don't add language like carrying capacity? At least develop a metric in some form that's appropriate. How are we going to make a reasonable decision on if it's an appropriate level or not?

Mr. Hull: Commissioner Katayama, to that point, I think the closest that could come to that would be a quota system or at least a ratio, and once you hit that ratio. Because ultimately if you are saying there is a carrying capacity, then what you're getting into...

Mr. Katayama: Well, is that a true statement? Is there a carrying capacity? I mean, should we be concerned about that? I don't want to get too philosophical. I mean, in our planning process, that is always the challenge is how do you match infrastructure needs with population growth or usage growth? And I don't know, this is more visceral than probably factual, but I tend to believe, and you guys correct me if I'm wrong, that in a transient situation, the infrastructure usage is going to be higher because of the nature of the residence now, occupants change. When you have a residential household, you assume a family-type population. When you have a

Homestay, that changes again, but I don't know if when we engineer these things through our building permitting process that we comprehend maximum use or average use. I know in commercial enterprises they take a more conservative approach to like water usage or wastewater. For residential, I don't know how we treat that. Again, I'm doing this more out of ignorance. But again, should I be concerned about if every house in my neighborhood says that they should be a Homestay, is that an impact?

Mr. Hull: To the point of carrying capacity, which is why it's important to have it through the Use Permit process is because it gets vetted by all of those agencies from Wastewater to Department of Health to the Fire Department to Engineering, which is in charge of the roads, and so on and so forth; and the Water Department to ensure that the infrastructure is there as you guys have become accustomed to it. If it isn't, they impose that requirement on the applicant. Speaking to the other nature of social carrying capacity, that's something that we don't really have numbers for. We can, I think as the Director likes to say, through our na'au we can tell there are some places that are reaching their social carrying capacity of transient accommodations. I think somewhat on face value you can say Hanalei, to a certain degree, reached its carrying capacity socially for...

Mr. Katayama: Well to me, the example would be vehicles. If you have a family of four (4), you probably have two (2) vehicles. If you are renting out a four (4) bedroom house to eight (8) adults, you might have eight (8) vehicles. That certainly, to me, most residential homes do not provide eight (8) parking spaces; therefore, you have on-street congestion. I mean, Seattle is a classic example of that. We saw that during our meetings. Is that something that we need to be concerned about? I mean, who looks at that? Does Public Works look at that? Does Water look at that?

Mr. Hull: Specifically for the parking example, there is the requirement of one (1) per bedroom. Generally, the Department sees it as a couple or a family that's in a bedroom, and they will probably just have one (1) car between that family. Engineering will also look at whether or not the roads can accommodate on-street parking or what not.

Mr. Katayama: As we, for example, encourage long-term rentals where you have now four (4) adults in two (2) bedrooms, wouldn't that equation sort of shift and consumption pattern shift? I don't know. Again, I'm looking for a Department to provide that guidance.

Mr. Hull: Yes, for the long-term rentals, there is an issue at hand, which is why, to bring the discussion kind of back to, specifically, the Homestays is why looking at it through the Use Permit lens where you can look at each situation case-by-case, and analyze whether or not the infrastructure is appropriate.

Mr. Katayama: So we, intellectually, determine that cap, whether that neighborhood has reached a carrying capacity?

Mr. Hull: I'll say it's fair to characterize the Planning Commission in that manner.

Mr. Abrams: But the extra stall required to have a Homestay would be off-site. It would not be on the street, right?

Mr. Hull: Correct.

Mr. Abrams: So that would have to be approved for someone who rented that, whereas if it was something different than a Homestay, then there is no regulation in regards to that. So then what we are back to is taking a look at the amount of cars that would be going through there, in terms of the carrying capacity of a particular neighborhood. I don't know whether I could come up with some sort of criteria to sort of figure that out. It would almost be a wash, if not less. Simply because I don't believe that the Homestays are going to be occupied 100% of the time either. I mean, I know we are moving in the General Plan to a lot more discussion in regards to all of these issues that are coming up, in terms of the studies that are in the baseline things that are coming up. I suppose we make it into some sort of carrying capacity, but then there would be an argument that would get into the situation of what is the difference between some house that has a bedroom that an owner-occupant is in that either is available, or would not be because he is going to rent it out, as to what would be the difference between capacity, in terms of what that house would be generating, right? I don't know whether or not there would be an easy way to go ahead and come up with something that would stick. Anyway, I think that what we have right now, and I would suppose that Council is going to weigh-in on this anyway, and in effect, have a lot of discussion, and put the final stamp on it. I would believe that with some of the speakers that are here, they are going to be speaking in front of the Council, too, at this point right now. I'm of the opinion to go ahead and get started, send it on over to them.

Chair Anderson: Okay. Is there any further discussion?

So we've had a motion and a second. We will go ahead and do a roll call vote on the recommendation, on the motion.

Mr. Hull: Commissioner Mahoney?

Mr. Mahoney: Aye.

Mr. Hull: Commissioner Katayama?

Mr. Katayama: Aye.

Mr. Hull: Commissioner Abrams?

Mr. Abrams: Aye.

Mr. Hull: Commissioner Ho?

Mr. Ho: Aye.

Mr. Hull: Commissioner Anderson?

Chair Anderson: Nay.

Mr. Hull: You have four (4) ayes and one (1) nay.

Chair Anderson: So the motion passes. Thank you very much.

Mr. Ho: Madam Chair, could I speak to you off the record for just a moment?

Chair Anderson: Do you want to take a recess? We'll go ahead and take a caption break for ten (10) minutes.

The Commission recessed this portion of the meeting at 2:59 p.m.

The Commission reconvened this portion of the meeting at 3:06 p.m.

Chair Anderson: Call this meeting back to order.

I believe we've moved through the agenda, and we will be recalling the matter that was tabled.

UNFINISHED BUSINESS (For Action) (Continued)

Class IV Zoning Permit Z-IV-2016-1 and Use Permit U-2016-1 to allow conversion of an existing residence into a bed and breakfast operation on a parcel located along the western side of Waha Road within the Shintani Subdivision in Kalāheo, situated approx. 500 ft. makai of the Ulu Alii Street/Waha Road intersection and further identified as 3913 Ulu Alii Street, Tax Map Key 2-3-015:061, and containing a total area of 10,098 sq. ft. = Monica Jean Adams-Hansen Trust.

Mr. Dahilig: Item L.2.

Chair Anderson: Item L.2., Class IV Zoning Permit Z-IV-2016-1 and Use Permit U-2016-1 to allow for conversion of an existing residence into a bed and breakfast operation. During the break, I believe the Department and the Applicant had a moment to discuss moving forward. If the Applicant would like to address any decisions that were made.

Mr. Chun: Yes. Thank you, Madam Chair. Thank you, Commission members, for allowing us time to sit down and take a deep breath, and to look at this with a very practical view as the Commission would want us to do. And I thank the Director for allowing this to happen. I think we made some good progress, and I think we have agreed to go forward on this, and really avoid the procedure (inaudible) that we're in, and that's really not conducive to anyone. I thank the Director for helping me see that. I think what we agreed to doing is, and the Director can chime in, but we will agree that the Commission will accept into evidence, in this matter, the Department's report, both the report Supplement No. 1 and Supplement No. 2. The Department will rest on those reports. The Applicant will not call them, the Department's representatives, witnesses, nor will the Applicant cross-examine any of the Department's Staff regarding the reports. The Department, and I believe the Applicant, will then agree that the Commission shall

consider all the documents, testimony, comments by other agencies received by the Department in regards to this application. We'll have no objections to that. The Commission will then be able to ask any questions, not able, but by the rule, the Commission can ask any questions of the Applicant and/or the Staff, and we have no objection to that either. The only proviso is the Department, I guess, if there are any questions to the Department Staff, the Department would want to have some clarification questions or response to that, and if there are any questions from the Applicant's side in regards to one (1) issue, and that is any constitutional issue, then we would like to have the opportunity to just ask or respond to questions on that also. Other than that, there will be no cross-examination of any witnesses from the Department or from the Applicant itself. We basically see that the argument really is a legal argument, not a factual argument. We agree, respectively, to disagree on the law on those matters. Just for the record, the Applicant will waive the right to notice of HRS Chapter 91, will waive the right for cross-examination under HRS Chapter 91, it waives it's right to submit proposed Findings of Fact, Conclusions of Law, and I don't know if the Department wants to do that, but the Applicant will waive its right to submit proposed Findings of Fact, Conclusions of Law.

Mr. Dahilig: We will concur and stipulate to the same effect. Just for clarification, the Deputy Director will be speaking on behalf of the Department if any questions from the Commission are to be asked of the Department.

Chair Anderson: Does our Counsel have comments for the Commission to consider in this proposed stipulation and waivers as to the Chapter 91 requirements?

Ms. Higuchi-Sayegusa: Under 91-9, there are requirements for all parties to receive notice and opportunity to prepare. It seems that the Applicant has waived receiving a notice, and is willing to go forward today. Likewise, the Department also waives its right to counsel. Is that correct?

Mr. Dahilig: Yes.

Ms. Higuchi-Sayegusa: Okay. So in an effort to move this thing forward today, there are certain...Chapter 91 is there and the formal Contested Case procedures are there so that everybody can be at a level playing field, have an opportunity to prepare the evidence and testimonies and their case, and to consult with attorneys. But now that both parties have agreed to waive certain rights under that, we can proceed. If you folks have any other questions, then I can try to answer, but it seems that we are going to go forward today. Questions are going to be asked and you folks are going to have to hear the arguments as to the law and we can move forward with deciding whether or not to approve the proposed use and the application.

Mr. Chun: That's the only thing. I think after the Commission asks any questions then the Department will just make a final argument, we'll make a final argument, and that's it. The Commission decides.

Mr. Dahilig: We concur.

Chair Anderson: Okay. Given the stipulation that has been presented to the Commission, there was still the question as to refer this to a Hearings Officer or to go forward now. We have a

procedure to go forward today with the stipulations that are set forth. I want to hear from the Commission, if we have a motion to...

Mr. Dahilig: If I can also just clarify for the record that the Department withdraws its request for a Contested Case Hearing pursuant to 91 and referral over to the Hearings Officer. So we withdraw our request.

Chair Anderson: Thank you. So without the request and because there is a stipulated agreement, it's my understanding that we can go ahead and move forward based on the agreement that's set forth.

Mr. Dahilig: We concur.

Chair Anderson: Okay. With that...

Mr. Chun: Madam Chair, that's the agreement, but, Mike, do you want, and I won't have no objection and I don't plan on (inaudible), but if you want the Staff to read the recommendation? Because I know that's the normal process, so if you want that, I have no problems with that either. And I don't plan on cross-examining on that.

Mr. Dahilig: I guess at this point, we don't object.

Mr. Chun: It's up to the Chair, how she wants to do it.

Chair Anderson: Again, we have an agreement. Its uncharted territory in terms of there have been waivers as to notice, waivers as to calling witnesses. With respect to the Director's Report, we have it. It's our standard practice that it's read, but it's the understanding that this is not witness testimony, but it is evidence that has been stipulated to. Okay, so we'll go ahead and have the Planner read the report.

Mr. Hull: Ultimately, the proposal is for a homestay operation. At the last Planning Commission meeting, the Department had recommended approval; however, it was contingent upon a recommended condition that the room that was being proposed to be used was...essentially, it's under the same roof, but there is no interior access, and that there be an interior access established in that room. The proposal was changed at that time, from the Applicant, to shift the proposal to a different bedroom that did have interior access. Ultimately, the Department still recommended that the interior access be established for that other room, so that the single-family dwelling would function as a single-family dwelling. We went back to further assess whether we had the legal capacity to do that because that question arose at the last Planning Commission, and I'll read the following evaluation points onto the record.

Mr. Hull read the Preliminary Evaluation and Recommendation sections of Supplement #2 to the Planning Director's Report for the record (on file with the Planning Department).

Mr. Hull: This concludes our evaluation and recommendation.

The brunt of the matter is essentially, and kind of the sticking point that the two (2) parties kind of have a disagreement on, is that the guest room, while not being proposed to be utilized for transient accommodations, is the Department's position that it functions within...or supposed to function as part of the single-family dwelling unit. The definition of a homestay operation on the Kaua'i County Code is a single-family unit for use for transient accommodations where the owner resides on-site. If you have a separate room with a bathroom, separate entry, and no interior access, that functions as a multi-family dwelling unit. Therefore, it should be brought into the actual definition where it's a dwelling unit as a whole operating together.

Chair Anderson: Okay. We won't take any additional information; if you could just limit it to the recommendations. We'll have any questions...the Commission can ask questions. At this time, I'll have the Applicant's response.

Mr. Chun: No. Part of the agreement was we were not going to question or argue with them. The arguments are for later on, so we have no questions for the Department.

Chair Anderson: Okay. So in your submittals that have been the petition, did you want to read from your petition or similarly or?

Mr. Chun: No. Again, we will just reserve any statements just for the final arguments. No sense repeating that. That's what the agreement was.

Chair Anderson: Okay. So at this time, does the Commission have questions for the Planner or for the Applicant? Let's start with any questions for the Planner.

Mr. Abrams: Madam Chair.

Chair Anderson: Yes.

Mr. Abrams: Kaaina, these attached...are they as-built plans that were submitted by the Applicant? And does this change...after looking at them, does this change, for you, anything relative to your recommendation?

Mr. Hull: No.

Mr. Abrams: Okay. That's all I have.

Chair Anderson: Any other questions for the Planner?

If I could ask that you describe...I know that it's set forth in the report, but if you can describe the issue with the interior door? And you had said the extinguishment of the lockout door. When you refer to the lockout door, is that an exterior door? Or can you explain?

Mr. Hull: Yes. In reviewing and doing both as-built plan review and also doing on-site inspection, the as-built plan review demonstrated that there was a guest room that is part of the main structure that has no interior access, but it does have exterior access. It has a

bedroom...actually, it also has a sink, cabinetry, and a bathroom in that guest room that does not have interior access. Also in the on-site inspection, it was also revealed that the second floor and first floor have a lockout door that, essentially, prevents or can prevent free egress between the two (2) floors. The official kitchen is on the second floor with a bedroom and a bathroom, and then on the first floor there is...while it isn't technically an official kitchen, there are sinks, refrigerator, and cabinetry. In looking at that, the Department has essentially assessed that it functions like a multi-family three-dwelling unit that has impacts among other things on infrastructure. Therefore, in asking for this requested higher intensified use, that the lockout be removed, as well as an interior access be established between the guest unit and the main dwelling unit; that way it would function as a single unit.

Chair Anderson: Okay. Are there any other questions for the Planner?

Mr. Ho: Kaaina, your recommendation is for just the door? No other alterations to the guest room?

Mr. Hull: We are recommending that a doorway be established between the first floor and the guest room; an interior door access. And then we are also stating that the doorway, which has a lock on it that separates the first floor and the second floor, be removed. The third and final one that's actually being recommended that condition, just for clarification, is that there are improvements on-site that don't have the appropriate permits, but can be given, essentially, Class I Zoning Permits; like the lanai needed to be permitted, so it's just saying to rectify that. But I think that's a relatively minor issue that in discussions with her legal representation is that they don't have any problems with that; at least as I understood.

Mr. Ho: Madam Chair, may I have a moment with Kaaina? I'm looking at something and it doesn't correspond with...can Kaaina just show me on this diagram?

Chair Anderson: Yes. If the Planner can approach, and if you can point out what exhibit that you're pointing to.

Mr. Chun: Madam Chair, if you mind, would I be able to see what...

Chair Anderson: Yes.

Mr. Chun: Thank you.

Chair Anderson: Speak into the mic in terms of the questions.

Mr. Ho: Is this, as I understand, where the door is going to go?

Mr. Hull: We recommended a door...

Mr. Ho: Here?

Mr. Hull: Yeah, it would have to go there for access.

Mr. Ho: So here. Okay. And the other one would close it off?

Mr. Hull: In the stairwell, on the second floor...

Mr. Ho: On the second floor itself, huh?

Mr. Hull: That door needs to be removed, essentially. Essentially the lock, technically.

Mr. Ho: Okay. So this door...what happens to this door? It's a locked door? How do they get (inaudible)?

Mr. Hull: They have...

Mr. Ho: Oh the stairwell. Okay, I got it. Okay, thank you, Kaaina.

Chair Anderson: If the Planner can summarize or explain just what you were pointing out on the map for the record.

Mr. Hull: I was talking with Commissioner Ho. Essentially, he had questions as far as where on the as-built plans the entryway would have to go for the guest room, so there is really only one (1) area if the interior access is required that it could go, connecting the guest room to the main structure; as well as to depict on the plans where the current lockout, separating the first and second floors, are.

Chair Anderson: Thank you.

Ms. Higuchi-Sayegusa: Were you gesturing whether he had this exhibit?

Mr. Ho: Yes.

Mr. Chun: Yes, we have that exhibit. That was filed as part of the original application? Yes, we do then. So we know exactly what was being pointed out. And what Kaaina was saying is true, that's where they were asking for.

Chair Anderson: Okay. Does the Commission have questions for the Applicant now at this time?

Mr. Abrams: Jonathan, that one you were looking at, so that I can make sure, upstairs where it shows the stairs going down to the lower area, right?

Mr. Chun: Correct.

Mr. Abrams: Where that stairs is closed off at the very top, that's almost at the master bedroom suite's door, is that where...?

Mr. Chun: My understanding, yes, that's where...

Mr. Abrams: That's where the door is that is a lockout?

Mr. Chun: Right. I've talked with my client and there is no lock on that door. On the door going...on the second floor that runs down to the first floor, there is a door, but there is no lock on that door.

Mr. Abrams: And it doesn't show as a door because a door would normally not be connected, right?

Mr. Chun: Correct. But where Commissioner Ho was pointing and where Kaaina was pointing, there is a door in that area. There was some confusion, yes, but there is no lock on that door. But that's not a contention. If they want to go back and inspect again, they can confirm, but there is no lock on that door.

Mr. Abrams: So does that mean a door without a lock is sufficient?

Mr. Hull: That would be correct, but the pictures from our inspection depict a deadbolt. Essentially, at the end of it, a door without a lock would, essentially, meet that condition.

Mr. Abrams: Okay.

Mr. Chun: That's not a contention. If they want to go back and inspect, no problem. We don't have a fight that there should not be a lock on the door from the second floor to the first floor. That's not a contention. The representation is, by my client, there is no lock right now. If they want to confirm that, no problem.

Mr. Abrams: Okay. Thank you.

Chair Anderson: Any other questions for the Applicant?

Mr. Katayama: I have a question for the Planner.

Chair Anderson: Okay.

Mr. Katayama: In Exhibit I of the application, the floorplan that says lower level and upper level, are the rooms labeled correctly?

Mr. Hull: As far as we know, yes.

Mr. Katayama: You made a comment that they...in the lower level, there was a refrigerator and other kinds of appliances. Where would they be located?

Mr. Hull: Yes. Where the cabinetry is in the family room is where the refrigerator and sink are located.

Mr. Katayama: Where it says “deck” and looks like a sink?

Mr. Hull: Yes, correct. So on the wall fronting the deck is where the sink, cabinetry, and refrigerator are currently located.

Mr. Katayama: Is it still presently there? For the Applicant.

Monica Jean Adams-Hansen: Yes.

Mr. Katayama: Thank you.

Chair Anderson: Are there any other questions for the Planner or for the Applicant?

Mr. Abrams: Applicant. Does a refrigerator constitute a kitchen?

Mr. Chun: Not to my understanding, Commissioner Abrams. The latest policy by the Department is you cannot have any cooking facilities, and that’s contained in their latest definition of kitchens that they published. It says you cannot have any room...they define it as installed equipment as further defined by the Commission and shall be interpreted by the Department as any appliance used to cook and prepare food including, but not limited to stovetops, ranges, griddle, rice cookers, toaster oven, microwave, hot plate, and/or deep fryer. So those are the specific things that they prohibited. Also on No. 4 of the rule, rooms designed to be used for cooking and preparing food shall require surfaces for installed equipment to be no more than eight (8) feet from a sink and a refrigerator. But I gather with that implied in there, you can have a sink and a refrigerator, and not be considered to be a kitchen.

Mr. Abrams: Thank you.

Chair Anderson: Any other questions for the Applicant?

Mr. Katayama: Which rooms will be designated for the homestay?

Mr. Chun: The Applicant has sent a letter to the Department indicating only Bedroom No. 3, which is on the first floor, to be used as a homestay; along with the family room that’s next to it. Of course, there is a doorway going up to the second floor, and there’s no lock on the door going upstairs.

Mr. Katayama: What is the disposition of the room labeled “Guest Room”?

Mr. Chun: “Guest Room” will only be used for the Applicant’s family members when they come to visit or friends, or their offices.

Ms. Adams-Hansen: Personal use. We don’t have people in there.

Mr. Ho: Excuse me. Isn’t there a doorway going in there? The guest room to the family room?

Mr. Chun: No. That's where the contention is because there is no current door from the interior going to that guest room. There's only an exterior...was it sliding door? Exterior glass sliding door from the deck to go into that guest room. According to the Applicant, for those of you who didn't hear, the Applicant was saying that's only going to be used for their own personal use and/or office. And I guess, occasionally, friends?

Ms. Adams-Hansen: Well if our family comes over from O'ahu.

Mr. Chun: If family comes over from O'ahu.

Ms. Adams-Hansen: Basically it's our own residence.

Mr. Ho: This is a door, not a pass-through, you are asking for the guest room?

Mr. Hull: Just the ability for the guest room to have an interior access to the rest of the dwelling unit.

Mr. Ho: Not a swinging door? It can just be a hole in the wall?

Mr. Hull: Just something that allows free passage between the two (2) rooms.

Chair Anderson: I have a question for the Applicant with respect to this passageway to this room. Is there a particular hardship or what is the issue with the construction that would prevent that from occurring?

Mr. Chun: That's a good question. It's not as simple as getting a circular saw and cutting a hole. There are conduits, electrical and water lines, going in between that one which need to be removed and/or relocated. That will be an expense in addition to just cutting a doorway in there, and then properly framing it, and so on and so forth. Again, I don't want to argue, but yes, that's the issue with that.

Ms. Adams-Hansen: Plus it's our private residential area. We don't want other people in there.

Mr. Chun: It's their office.

Ms. Adams-Hansen: It can be our family office; private part of our residence. We don't want access in that.

Chair Anderson: Okay. Are there any other questions for the Applicant?

Mr. Katayama: In your application, you continued to rent a maximum of three (3) bedrooms within the main house. The Applicant will continue to reside in one (1) bedroom.

Mr. Chun: We submitted a letter changing that. The letter is attached to the Department's Supplemental No. 2, I believe. That letter specifically stated that we are limiting it only to one

(1) bedroom, and specifically to Bedroom No. 3. We made that representation at the last meeting also.

Mr. Katayama: In the spirit of homestays, how would the interaction be with the guests?

Mr. Chun: Again, that's one (1) reason why they wanted no lockout so there is interaction between the guests and the homeowner. If you want to ask details in terms of how detailed and how congenial it is, I mean, I can ask the Applicant.

Do you want to respond to that?

Mr. Katayama: Please. If you don't mind.

Mr. Chun: How do you interact with your guests?

Ms. Adams-Hansen: When we do have guests, we greet them, answer their questions, give them maps of the island, and show them where they are supposed to park on our own property. We show them the front door, of course, take them to their entrance through our front door, and a lot of times they have a lot of questions about the island and so we accommodate them. As days go by, if they are staying more than one (1) day, new questions might arise. If a light bulb goes out and they need a light bulb, we are right there on the premises. So it's a homestay, we live in the home and we accommodate our guests as to whatever they need. Does that answer the question?

Mr. Chun: Do you see your guests on a daily basis?

Ms. Adams-Hansen: Oh yes. Well, sometimes they leave at 7 in the morning, and we may not see them until they come back at the end of the day. Sometimes they don't want to talk to us. They just want to get in and take a shower and get ready for their next event if it's going out to dinner or something. But the majority of...we don't do a lot of business. We have family and friends that come to visit, too; that's why we have that family room because we all hang out down there. And then there's the bed and bathroom separate from our living area, which is upstairs. So people have their own privacy spaces. My husband might have some people over, fishermen, where they all hang out in the family room. That's why we don't lock that door. We are always using that space as part of our residence. It's nice to have that third bedroom and bathroom for tourists. Specifically, I've been doing this for so long under the impression that I was doing the right thing because I went to the Planning Department and asked questions various times. I was always told as long as you live in the house, you don't have to do anything, as long as you live on the property. And this was...the last time I went in there was 2012. Anyway, I just wanted to point out, since we've been doing this for so long, we have a lot of repeat customers that are now our friends that come every year, they want to stay with us, they don't want to stay in a hotel, so it's not like we have a lot of strangers because we don't really want that. And I don't know if that answers your question.

Mr. Katayama: No, I just wanted to get a sense of the...what interactions and the types of amenities that you provide to your guests.

Ms. Adams-Hansen: We provide toilet paper and paper towels. Dish sink, and you know, if they bring home a to-go thing from a restaurant, so you know, we try to make them feel at home. Towels and linens we provide; beach towels. On the deck, we have beach chairs, a cooler, and things like that. So we try to accommodate them to...and we also caution them not to swim at Polihale and certain places where there are no lifeguards.

Mr. Katayama: Thank you.

Chair Anderson: Any further questions?

We have the Director's Report and the Supplement that have been stipulated. We'll go ahead and go with the reading of the recommendations at this time.

Mr. Hull: Oh, I read the recommendations.

Chair Anderson: Oh, you read the recommendations and the conclusion.

Mr. Hull: Really, the recommendations of the previous Director's Report stand as-is, and then you have this 17th and final one that we are recommending be adopted.

Chair Anderson: Okay. Thank you for that clarification.

Mr. Chun: If you want, both parties can make final arguments in terms of what their position is. And I think the only contention is that the doorway with the guest room. So I mean, the Department can start, or if you want us to start, it doesn't matter.

Chair Anderson: Okay. Does the Department have any final arguments or closing arguments?

Mr. Hull: Yes. The Department's position ultimately in this, and I know the discussion was somewhat prefaced with the discussion we had last month at the last Planning Commission meeting, concerning the fact that the Applicant has amended their proposal for the transient accommodation bedroom unit to be changed so that it's in a room that has interior access. Under that, we are still recommending that the interior access be added to the other guest room that will function as part of the dwelling unit. And our position in this is that the definition of a homestay under the Kaua'i County ordinance is an owner occupied dwelling unit in which overnight accommodations are provided to transient guests within the same dwelling unit in which the owner resides and the respective owner currently benefits under Section 511 of this Code for homeowner's exemption. We are not just analyzing a single bedroom unit. We are analyzing the entire dwelling unit as functioning as a homestay operation, and as such, it should function as a single dwelling unit. In the event that you have lockouts in addition to bathrooms and somewhat pseudo kitchens in areas that allow those other rooms to function separate and apart from the dwelling unit, you essentially have a multi-family dwelling unit. And what you have functioning there will add to the impacts that this further intensified use, this homestay operation, has on the neighborhood and the infrastructure in and around the area. That's ultimately what we are...we are not arguing or disputing that they were given permits for these originally or that it's illegal or legal. What we are saying is we are not reviewing on the notion of illegality. We are reviewing on the notion of compatibility of this homestay operation on-site. In order to

ensure that it is compatible with the neighborhood, we need to ensure that the site functions as a single-family dwelling unit, and not a multi-family dwelling unit. We don't think it's too much to ask. We are recommending approval for this, but for a relatively minor access way to be established between the floors and between the bedroom units, so that, again, it functions as a single-family dwelling unit. We'll rest on that.

Chair Anderson: Okay. We have final statements from the Applicant.

Mr. Chun: Thank you, Madam Chair. Let me just kind of outline, generally, where we are going to come from so we can all look at the clock and get out by a reasonable time. I'm going to outline in general the function of the Commission, then I'm going to let you know what I believe is the State of the Law, and then I'm going to apply the State of the Law to what the facts, as contained in the record, show.

First of all, with the function of the Commission, there's a lot of discussion going on with Commissions in terms of whether or not we should have Commissions, and what Commissions are for. The best argument I've heard is that Commissions act as a buffer between the public and government. In other words, the Commission is there to make sure that the public's interest, individual members of the public, and the greater public is there; their interests are protected and understood as opposed to just the interest of what government wants. They are the buffer between the government and the public. That's what we're asking here. Obviously, the Department feels one way; obviously, the Applicant feels one way. We need a buffer to make sure that whatever government does is reasonable. So that's where we are today.

Now, what is reasonable? Yes, I would argue and I would say that can be looked at in terms of beauty is in the eye of the beholder, but in this case in particular, I know it's a small thing, but it's a cost; cost matters. It's something that my client has to pay, and it's not a small sum. I mean, it's easier if you're making thousands or hundreds of thousands of dollars, and you're representing huge corporations and some other partners do, but I represent small guys. And spending that kind of money just because the government wants you to do that is another story.

Now, what is the law? The law is very simple. It is our position that it is a taking...when the government comes in and says you knock down that wall because I want you to; that's a taking because government is taking your wall and saying you can't have it anymore. That's a taking. The Supreme Court, interestingly enough, in a case that originated in Hawai'i, took a big step and really clarified what it meant as a taking. The Supreme Court in the case called *Lingle versus Chevron*, some of you might remember that, but in *Lingle versus Chevron*, the Supreme Court very clearly stated there are two (2) really big issues of taking, and then there's a third one. The first two (2) is if there is a physical taking, if something is physically being removed or taken by a property owner, that's a per se taking. You don't have to prove anything else. You, government, have to pay for it or stop it. Second point the Supreme Court in *Lingle* said very clearly is that in taking decisions is if you destroy all economic use of the property; that's a taking. Government, that's per se, you've got to stop it or pay for it. The third one is you can have regulatory takings or regulatory conditions, but the regulatory takings have to have a nexus between whatever you want or taking versus the harm that you are trying to prevent. That the Supreme Court in *Lingle* said those cases are based upon two (2) other (inaudible) cases called

Dolan and Nollan. I'm going to explain what I meant by Dolan and Nollan. Dolan was the Supreme Court case that came out from the east coast. In that case, there was a situation in which the government wanted to take away or require as a condition of a permit an access easement running parallel to the beach. The landowner appealed saying no, you can't do that, that's a taking. The Supreme Court decided that it was a taking, and the reason why was this: the Supreme Court said why did you want to take an easement running parallel to the beach when the guy is just building a house, you know? And the response from the government was well, because the house is going to block visual access. It's going to make everything look like a whole wall of houses around the shoreline, so you can't see the shoreline, it's going to prevent people from getting access to the easement. That was the response by the government in Dolan, or in Nollan. The Supreme Court heard that and said yeah, I understand that, but how is requiring an easement on the backside of the house, by the beach, running parallel, going to make the house look less imposing and blocking the view? It doesn't do anything with the view. If you're concerned about access to the beach, either visually...how does an easement that runs parallel to the beach, not to the road, but along the beach, how does that improve access from the road to the beach? And they couldn't answer that question, so the Supreme Court basically said no, there is no nexus between requiring that easement parallel to the beach versus your concern about blocking the visual access of the houses to the beach. So, government, you can't do that. The second important case, which came out in a taking, was the Dolan's case. It came out from Oregon. In that case, the landowner wanted to build a shopping center in, I think it was in Tigard, Oregon, and I know that because my brother went to school around that area, but in Tigard, I think they call it Tigard, Oregon. In that case, the government came back and said yes, you can build your shopping center, but by the way, you have to give me fifteen (15) acres of this land, and you have to build bikeways in there, you know, to support this. The landowner appealed, saying that's way too much as a condition for building my shopping center, and then it went all the way to the Supreme Court. The Supreme Court asked the same questions, okay. Why did you require it? The government in Tigard said well, I'm requiring the dedication of this land because it's a flood plain and it will protect it from flooding the area. Okay, and then they asked, why did you require the bike path? Oh because it's going to be an intensification of the use, you are going to have people driving there, and it's going to impact traffic. Sounds reasonable, but the Supreme Court went one (1) step further and said well, how much traffic is going to be generated from this shopping center and how many people are going to be riding this bike path that would alleviate this traffic? And the City of Tigard could not answer that question. The Supreme Court also asked the question, how though, if you are concerned with flood plain and flooding, how is just giving the land to the city going to prevent flooding? As opposed to requiring them to put a flood retention basin or something for the control. You know, what has giving the land for green..., (inaudible) have to do with flood control? Again, the City of Tigard couldn't answer. In that case, the Supreme Court of the United States said no, you cannot, government, ask for something and then not have a reasonable nexus between what you want and the problem that you are trying to control. That's Nollan versus...Nollan and then Dolan, the Nollan and Dolan cases as we call it.

Now, applying that law to the situation here, and even though we are not talking about a shopping center, we are not talking about building a house next to the beach, we are talking about two (2) things: (1) it's a physical taking because you are taking somebody's property, their house, the way it was designed, and saying I don't like the way you designed it; take that away.

It's a physical destruction. Now, it might be argued by the County that hey, that's a minor thing, it's just a door, but the Supreme Court addressed that issue in Dolan very clearly. I want to make sure that I read this to you because the Supreme Court in Dolan was faced with that argument, and the Supreme Court basically said this, and I'll read it to you, in regards to a kind of charge that it's so small that you shouldn't be concerned about. Sorry, I have to find...

Chair Anderson: Excuse me, Mr. Chun.

Mr. Chun: Yes.

Chair Anderson: I'd like to have proportionate amount of time with respect to the closing arguments.

Mr. Chun: Sure.

Chair Anderson: So if you can limit your argument for another ten (10) minutes.

Mr. Chun: Okay, sure. That's no problem. Rather than do that I'll just say, the Supreme Court basically said in Dolan that it doesn't matter how minor the taking is. If it's a physical taking, the burden is on the government. It doesn't matter, and that's why they call it per se takings. Now, that's one (1) argument. It's a physical taking. Even if you would not or the court would not define that as a physical taking, and we think it is because you are physically taking a wall away, but even if not, you are faced with, the government is faced with the third test of a taking. That third test is, is there a relationship between the door and the guest room, which is not going to be used for a bed and breakfast, and the standards that you are to apply in granting the Use Permit. In that one, we will submit that I don't believe the Planning Department has said anything in that regards. Well, I must correct. They did make one (1) single statement in their second report, and that is...and the only thing that you find on the record regarding that is on Page 2, Item No. 4 of the Preliminary Evaluation. This is what they say: although the current floor plans were approved under OEP permits for a residential structure, the applicant is now proposing to intensify the use through a homestay operation; and we have some issues with that. But, they go on to say, as such, the applicant should comply with the Department's policies, not the law, but the policies in order to ensure compatibility of the dwelling unit, which will function as both a dwelling unit and a transient accommodation, with the surrounding residential area. That's just the conclusion; no facts, no facts. They're just saying we are doing this because if you don't, it won't be compatible with the surrounding residential area. Ask yourselves this question, how does an interior door, that nobody can see, that nobody can get into, affect the character of the neighborhood? Other than just saying that, there is no nexus. And the court in deciding these issues have said very clearly, the burden is on government. If they are going to be requiring these things, the burden is on the government to prove adequately facts the nexus. It's not the Applicant to disprove you. It's the burden on the government to, first of all, prove there is a nexus. The Supreme Court stated the Findings of Fact that the bicycle...and this is the Dolan case in Oregon...the Findings of Fact that the bicycle system could offset some of the traffic demand is a far cry from a finding that the bicycle system will or is likely to offset some of the traffic demands. No precise mathematical calculation is required, but the city must make some effort to quantify its finding and support of the dedication for the pedestrian bicycle

pathway beyond the conclusory statement that it could offset some of the traffic demand. In other words, the Supreme Court in Dolan said the government just can't say it and make it true. The government, if it's going to prove themselves, they have to show you at least some facts and make at least some efforts to show how this requirement is going to fix their perceived problem. In this case, we don't have. Like Dolan, they're just making a conclusory statement that if you don't do it, it won't be compatible, and that's what we find objectionable. If there was something in there, in these facts, in this report, to show as a matter of law that there is a nexus between putting a doorway in there and how the neighborhood would be incompatible if it wasn't, then they could have a case. But if not, then I ask the Commission to look in itself and say, how is that going to make the whole structure compatible with the neighborhood?

Now, we have other...and I'm closing up right now.

Chair Anderson: Five (5) minutes.

Mr. Chun: Five (5) minutes? Oh, okay. I'll talk for five (5) minutes. No, no. Just a few more observations, but the observation is one. The second report didn't even address the fact that the application went down from three (3) to one (1). Instead, it makes just the conclusory observation or conclusory statement that hey, you are intensifying the use. And we will say we're not. We are going from a single-family dwelling that has four (4) bedrooms that could potentially be used by five (5) people at a minimum to a house, which is only one (1) bed and breakfast, be used by (inaudible), so we're two (2) people at the most. So how can one (1) bedroom intensify the use? And how can, when we're taking out three (3), especially that guest room, how is that intensifying the use? Again, that's not being addressed at all.

The other point is, and this is the minor one that we want to make is, how can government turn around, recognize that in 1993, that guest room as designed with no interior doorway now has to be changed? The government approved it in 1993. There's no dispute about that. They recognized that. The government approved it in 1993. They stamped it. They built it according to...for that room, they built it according to what it said. And now just because I want to use another room in the structure, that room has got to change. Again, I perceive that as a taking, but at the most, again, there's another constitutional argument that it is grandfathered because government approved it. For government to come back and say well, I approved it, but I don't want you to have it anymore, that raises a serious constitutional question of grandfathering.

In closing, I think what the real issue is going to focus on is how will government state that...well, let me put it another way. Government, through its ordinances and through its rules, has not decided that this is two (2) dwelling units. I mean, you've heard it over here. They are not saying its two (2) dwelling units. They say it functions like a dwelling unit, but it's not a dwelling unit. There's no second kitchen. So how can something that is not violating any current provision of the Comprehensive Zoning Ordinance now has to be changed? I point that out, and I want to end with this. I'm going to point that out, and pointing to the Commission to be aware, very much aware, of its own rules in this regards. For example, the statement made was that well, it functions as a dwelling unit. We disagree. Because if you look at the ordinance and your own rules, this is what a dwelling unit is, under the ordinance. A dwelling unit means any building or any portion thereof which is designed or intended for occupancy by one (1)

family or persons living together, or by a person living alone and providing...and this is the important one...and providing complete living facilities within the unit for sleeping, recreation, eating, and sanitary facilities; including installed equipment for only one (1) kitchen. A building or portion thereof that contains more than one (1) kitchen shall constitute as many dwelling units as there are kitchens. In this case, there is no question. There is only one (1) kitchen. They haven't alleged there are two (2) kitchens; it's only one (1) kitchen, so one (1) dwelling unit. If there's only one (1) dwelling unit, how can they say, now, it functions as a multi-family dwelling? Because this is the definition of a multi-family dwelling: dwelling, multi-family, this is in the ordinance, means a building or portion thereof consisting of two (2) or more dwelling units designed for occupancy by two (2) or more families living together independently of each other where any of the one (1) structure units is structured depending on any units. Again, the operative word is there has to be two (2) dwelling units. We already went through. There's only one (1) dwelling unit because there's only one (1) kitchen. I don't believe they are going to say that there are two (2) kitchens. I haven't heard it and it's not in their report. And they also haven't said that there is...that whatever sink and refrigerator is there is in violation of their own policy, which allows a sink and a refrigerator as long as it's within eight (8) feet. They didn't say that it violates that policy. So the question is, what policy did they say it violates? If it's a policy, that policy cannot stand if it doesn't violate the law. Again, the question we have to ask is if we are not violating the law, why do you have to change a structure which was permitted by the law? That's the question that we ask the Commission. For you to do that, it's a taking. It's a taking physically, and a taking...but there is no nexus between the harm and putting in a door. If there is any further questions, I am happy to answer them and I hope I didn't run out of time.

Chair Anderson: You went slightly over, but it's okay. (Laughter in background)

Mr. Hull: Will the Chair allow a one (1) minute rebuttal? At your discretion.

Chair Anderson: I would prefer to have the Commission now entertain a motion, rather than to get into rebuttal and then rebuttal.

Mr. Abrams: Madam Chair?

Chair Anderson: Yes.

Mr. Abrams: I move that we approve the Planning Staff's report, original one and in Supplement No. 2 with the addition for Class IV Zoning Permit Z-IV-2016-1 and Use Permit U-2016-1, Monica Jeans Adams-Hansen.

Chair Anderson: Is there a second?

Mr. Katayama: Second.

Chair Anderson: Okay. Discussion?

Mr. Abrams: Well I know it doesn't get it completely resolved, but I do concur with Staff in regards to this bedroom that needs interior access. How that was set up? I'm not sure, but I've

always understood that there has to be access that way, so I think that request is reasonable. So that's why I'm going to be supporting my motion.

Chair Anderson: Okay. Any other discussion on the matter?

Mr. Katayama: I think the conditions as presented, at least for Condition No. 2, needs to be a little more reflective of the current adjustments. Homestay operations be limited to one three (3) bedrooms within the residential dwelling. I think that needs to be clarified to either something like, as identified to Bedroom No. 3 in Exhibit L, or something like that, whatever it is that you need to further identify the intended use.

Mr. Hull: Yes, the Department would be in concurrence with that.

Mr. Katayama: Just to be clear because I think there has been certain adjustments or, you know, flexibility with the Applicant related to the conditions.

Mr. Abrams: Are you saying something more specific like upstairs?

Mr. Katayama: Well I think in their exhibit, how they identify, and the attorney for the Applicant eloquently described the location and the use, and we should just...

Mr. Hull: Given that, the Department would recommend that Condition No. 2 be amended to state, "For transient accommodation purposes, the subject homestay operation shall be limited to Bedroom No. 3 as reflected on the as-built plans".

Mr. Katayama: And that's Exhibit L?

Mr. Hull: Correct.

Mr. Katayama: Thank you.

Mr. Ho: What was that Kaaina?

Mr. Hull: So Condition No. 2 would be recommended to be amended: (2) For transient accommodation purposes, the subject homestay operation shall be limited to Bedroom No. 3 as reflected on the as-built plans in the application's Exhibit L.

Chair Anderson: Is there any further discussion regarding amendments?

Mr. Ho: Can I address Kaaina again, please?

Chair Anderson: If you have a question, yes.

Mr. Ho: Kaaina, what does the amendment mean? You are asking for the doorway?

Mr. Hull: No. It just reflects the updated amendment that the Applicant amended the proposal to be in a specific bedroom, and we needed to reflect our condition of approval to reflect that proposal. So the condition would still stand from the Department's recommendation that the interior access be established for the guest room.

Mr. Katayama: Would the Department be willing to modify Condition No. 17 if the Applicant somehow gives the Commission comfort that they would not use that as any part of income producing area as a homestay or any other? If you modify the condition to reflect that?

Mr. Hull: For the Department, it has nothing to do with the potential for commercial income to be done; that's fine for operations. What it ultimately has to do with is impact to the surrounding community and particularly impact to infrastructure. Say the conversation that we had previously concerning how do we address infrastructure with these homestay operations? When you have this unit functioning like a separate unit you have issues, like we discussed previously, such as parking. There will be more parking demands when you have separate units functioning separately. While it might not legally be classified as an additional dwelling unit, it functions in the same manner as one and puts additional stresses on infrastructure and the surrounding community, so the Department would still hold that...

Mr. Katayama: If the Applicant were to consider that storage area, would the Department still have that same concern?

Mr. Hull: Yes. Quite frankly, we would.

Mr. Abrams: Kaaina, I think...is that Exhibit I in the application?

Mr. Hull: Oh, forgive me. Exhibit I.

Mr. Katayama: Thank you.

Chair Anderson: So if the Commission...we've got a motion, and if we can keep our discussion to the Commission floor. So what has been proposed is an amendment. There was a motion on the floor, so I believe that motion would need to be withdrawn to amend.

Mr. Abrams: I'll withdraw my motion.

Chair Anderson: Okay. Do we have a withdrawal of the second?

Mr. Katayama: I withdraw my second.

Chair Anderson: Okay.

Mr. Abrams: I make the motion to approve Class IV Zoning Permit Z-IV-2016-1 and Use Permit U-2016-1 as amended in the...I guess this would be the Staff Report dated September 8th and in addition to the October 27th addition that would go for, excuse me, Monica Jeans Adams-Hansen.

Chair Anderson: Do we have a second?

Mr. Katayama: Second.

Chair Anderson: Okay. Discussion?

Mr. Katayama: That's Condition Nos. 1 through 17, right?

Mr. Abrams: Yes.

Mr. Hull: Correct.

Chair Anderson: Any other discussion?

Mr. Abrams: I'd like to thank Staff and Applicant for working this out today. That was above and beyond the call and I appreciate it very much.

Chair Anderson: With respect to the arguments, there is this central issue that's been debated. While I do believe that there was information that the...was contained in the report that does go to the compatibility issue, I, personally, was not persuaded by the Department's arguments in terms of that issue with the interior door. While I neither was persuaded that the regulation would be a takings, my particular stance would be that I would feel comfortable approving the permit without the requirement of creating an interior passage way. So those are my comments, but it's neither here or there.

Any other discussion?

Mr. Ho: Ms. Anderson, are we going to vote on your comment just now? That's not it, right?

Chair Anderson: No, it's just a comment. We are in discussion, so if there's discussion that may generate another amendment or support, but I'm not proposing an amendment.

So with that, we'll go ahead and do a roll call.

Mr. Dahilig: Madam Chair, just for the record, given the motion, we need to maybe clarify whether or not this is...if there's a standing objection to the motion on the floor, if it were to pass or not pass.

Mr. Chun: Do we object to the motion? Or just the procedure?

Mr. Dahilig: Well, no. We need to...I guess, based on what the motion is, because there were amendments, there should be on the record a clarification whether or not there's anything objectionable by the Applicant.

Mr. Chun: Other than the door. (Laughter in background)

Mr. Dahilig: So, no. Just to make that clear.

Mr. Chun: We don't want to go over that one again, do we?

Mr. Dahilig: Alright. Well, just for the record.

Mr. Chun: Yes, yes.

Mr. Dahilig: The motion on the floor is to approve Class IV Zoning Permit Z-IV-2016-1 and Use Permit U-2016-1 as provided in the recommendation as amended by the Commission and over the objection of the Applicant pertaining to the interior connection issue.

Commissioner Mahoney?

Mr. Mahoney: Aye.

Mr. Dahilig: Commissioner Katayama?

Mr. Katayama: Aye.

Mr. Dahilig: Commissioner Abrams?

Mr. Abrams: Aye.

Mr. Dahilig: Commissioner Ho?

Mr. Ho: Aye.

Mr. Dahilig: Chair Anderson?

Chair Anderson: Abstain.

Mr. Dahilig: 5:0, Madam Chair.

Chair Anderson: With that, the application is approved.

ANNOUNCEMENTS

Topics for Future Meetings

The following scheduled Planning Commission meeting will be held at 9:00 a.m., or shortly thereafter at the Līhu'e Civic Center, Mo'ikeha Building, Meeting Room 2A-2B, 4444 Rice Street, Līhu'e, Kaua'i, Hawai'i 96766 on Tuesday, November 10, 2015.

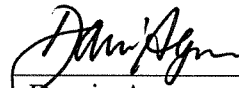
Mr. Dahilig: Madam Chair, I believe that concludes all the business that we have for this meeting. We have circulated the batting order sheets for the next meeting. In particular, there are two (2) items for discussion; one (1) is a proposed homestay again that was received for the record and set for hearing, and the second one is a Zoning Amendment relating to additional dwelling units. And that will be handled at the November 10th meeting. Just to give some background to the Commission before...and not for discussion, but just for background...the bill that will be coming up is similar to the bill that was adopted by the City and County of Honolulu pertaining to dwelling units; however, it is a proposal to limit those types of units to the Līhu'e Planning District. So that will probably be a big point of discussion for the Commission at the next meeting from a policy perspective. I believe that's all that we have coming up, Madam Chair, and that's all the business that we have. Again, thank you for your service and patience today.

Chair Anderson: Thank you. With that, this meeting is adjourned.

ADJOURNMENT

Chair Anderson adjourned the meeting at 4:19 p.m.

Respectfully submitted by:



Darcie Agaran,
Commission Support Clerk

() Approved as circulated (add date of meeting approval)

() Approved as amended. See minutes of _____ meeting.